Supreme Court of the United States

No. _____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RECORD REFERENCES.

The certified record filed with this application is an "Appendix Record", which contains four appendices, each of which is attached to one of the first four unnumbered pages of the certified record.

The appendix filed in the Court of Appeals by Rex Schepp and Benjamin F. Shepp is attached to the first *unnumbered* page of the Certified Record, and is herein referred to as R. Ap. I. This appendix is bound with a brief.

The appendix filed by appellees Producers, Inc. *et al.* is attached to the second *unnumbered* record page and is herein referred to as R. Ap. II.

The appendix filed by appellees Red Spot Paint and Varnish Co., *et al.* is attached to the third *unnumbered* record page and is herein referred to as R. Ap. IV. This appendix is also bound with a brief.

The appendix filed by Douglas H. McDonald, Trustee, is attached to the fourth *unnumbered* record page and is herein referred to as R. Ap. IV. This appendix is also bound with a brief.

The nine copies of each of such appendices filed herewith have been correspondingly marked with Roman Numerals, I, II, III and IV.

The Opinion of the Court of Appeals is printed as an appendix to this brief, with the original pagination indicated by asterisks, and is herein cited as OP. C. A. *1, etc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. _____

REX SCHEPP, AND BENJAMIN F. SHEPP,
Petitioners,

vs.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioners, Rex Schepp and Benjamin F. Shepp, would respectfully pray that this Court issue its Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit rendered in a certain cause entitled "In the Matter of Evansville Television, Inc., debtor; Rex Schepp and Benjamin F. Shepp Appellants *vs.* Producers, Inc., *et al.* Appellees," being Cause No. 13024 on the docket of said Court; and your petitioners respectfully present:

(a) The opinion in said cause has not been reported.

(b) The jurisdiction of this Court is invoked on the following grounds:

(i) The said judgment sought to be reviewed was rendered and entered on January 5, 1961 at 9:30 a.m.

(ii) No petition for rehearing was made and no order entered extending time to petition for certiorari.

(iii) The jurisdiction of this Court is invoked under 11 U. S. C. 47(c), 28 U. S. C. 1254 (1) and 28 U. S. C. 2101(c) which are set out in the appendix.

(c) The questions presented for review are:

(1) Whether or not want of the good faith required by 11 U. S. C. § 144 was conclusively demonstrated, in the filing of a Chapter X creditor's petition which was admittedly proposed as an alternative to relinquishment of control by the holders of majority voting stock, and implemented by a consenting answer voted by a board of directors a majority of whom, in combination with petitioning creditors, were seeking to purchase the majority voting stock on their own terms; (both by reason of the improper purpose of the filing and by reason of illegal means used to procure approval of the petition).

(2) Whether or not lack of good faith was conclusively demonstrated by an affidavit filed to comply with General Order 5(2) asserting on personal knowledge that one of the petitioning creditors (Producers, Inc.) had not acquired its claim for the purpose of instituting a bankruptcy proceeding, whereas it was admitted by the affiant that he did not have personal knowledge but merely hearsay knowledge, and that counsel for petitioning creditors had nevertheless provided the hearsay (in part) and procured and advised affiant to make this false affidavit of personal knowledge.

(3) Whether or not lack of good faith was conclusively demonstrated by a supplementary General Order 5(2) affidavit verified by the assignor of the claim in question who was also a controlling stockholder of all three petitioning creditors, stating the "true consideration" of the assignment as "$300,000.00 paid" to another petitioning creditor, whereas he admitted that no money had been paid and that the consideration was in fact a series of book credits and debits between corporations under unitary control.

(4) Whether or not a Chapter X creditor's petition originally defective for want of three creditors may be cured and supplemented after its approval by the intervention of additional creditors.

(5) Whether or not three corporations separately incorporated as parts of a single enterprise under unitary control constitute three creditors or only one within the meaning of U. S. C. § 526.

(6) In a Chapter X reorganization proceeding, after initial approval of the petition, but during hearings on timely stockholders' answers seeking dismissal of the petition, a temporary injunction was entered against the answering stockholders and also orders allowing compensation to the Trustee and counsel over the stockholders' objection. Were these interlocutory orders appealable on appeal from the final decree confirming approval of the petition, or were they only appealable within the time allowed by 11 U. S. C. § 48 and § 250?

(7) Whether each and all of the following acts of the District Court, sanctioned by the Court of Appeals constitute such a departure from the accepted course of judicial proceedings as to require revision by this court; namely:

(a) The District Court approved this Chapter X reorganization as filed in good faith and appointed a trustee upon the basis of a *consenting* answer purporting to be authorized by the Debtor's directors after a controverting answer had been filed which alleged that these directors had combined with petitioning creditors to defraud the stockholder of his rights, and without hearing any evidence on the issues tendered by the answer.

(b) The District Court, without prior application for injunction, without any notice that an injunction might issue, without any hearing upon whether an injunction should issue enjoined the calling, or holding of any meeting of the Debtor's stockholders, and the Court of Appeals has sanctioned this palpably arbitrary abuse of judicial power by dismissing petitioners' appeal and denying mandamus and prohibition.

(c) The District Court, after uncontradicted proof that a false affidavit had been filed under G. O. 5(2) and that the falsity of this affidavit in at least one respect had been not only known to but its making solicited by counsel for petitioning creditors, nevertheless refused to recognize this as a conclusive proof of the absence of "good-faith" and the Court of Appeals has not only sanctioned this but excused it on the basis of a substitute affidavit which was itself admittedly untrue.

(d) The statutes which the case involves, in addition to the jurisdictional statutes previously cited are:

Bankruptcy Act § 25, 11 U. S. C. § 48.

Bankruptcy Act § 59(b) and (f), 11 U. S. C. § 95(b) and (f).
Bankruptcy Act § 126, 11 U. S. C. § 526.
Bankruptcy Act § 136, 11 U. S. C. § 536
Bankruptcy Act § 137, 11 U. S. C. § 537.
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Bankruptcy Act § 144, 11 U. S. C. § 544.
Bankruptcy Act § 146(1), 11 U. S. C. § 546(1).
Bankruptcy Act § 161, 11 U. S. C. § 561.
Bankruptcy Act § 206-207, 11 U. S. C. § 606-607.
Bankruptcy Act § 250, 11 U. S. C. § 650.
General Order in Bankruptcy, 267 U. S. R. 613 5(2), 28 U. S. C. 1292.

STATEMENT.

This Was a Collusive "Reorganization" to Obtain Corporate Control.

This proceeding was begun as a creditors' petition for the reorganization of a corporation purporting to be filed pursuant to § 126, *et seq.*, of the Bankruptcy Act (11 U. S. C. 526, *et seq.*).

The three corporate petitioners are in fact three facets of a single unitary business enterprise which were successively organized by one Ferris Traylor to meet the needs of an expanding post-war business, all remaining under the control of Ferris Traylor by reason of the Stock ownership of himself and brother and their subordinates. (R. Ap. I, 38.) Stock of Traylor Bros., Inc. and Producers, Inc. was owned by the Traylor brothers 50% each. Each Traylor brother owned 25% of Industrial Contractors' stock. The remaining 50% was owned by employees of the three companies. (R. Ap. I, 18.) The three corporate petitioning creditors will be subsequently referred to as Traylor Bros., Producers, and Industrial, respectively.

Evansville Television, Inc. alleged debtor had issued and outstanding 25,000 shares of Class A voting stock and 25,000 shares of non-voting Class B stock. Fifteen thousand shares, a majority voting control, were held by petitioner Rex Schepp (11,000) his wife Mary Eaton Schepp (2,000) and his brother Benjamin F. Shepp (2,000). From and after June 12, 1956, until after the filing of this petition for reorganization, the board of directors of the debtor was controlled by Traylor, John W. Krueger, John Moser, and Freeman Keyes (holders of the remaining voting stock

and substantially all the non-voting stock) by virtue of a Buy-Sell option and voting trust agreement which had expired August 31, 1958. (R. Ap. I, 95.) Notwithstanding the expiration of this option, unexercised, Traylor remained President, and Traylor, Krueger, Moser and Keyes, directors, of the debtor when the petition was filed. (The above facts in more detail appear in the Opinion of the Court of Appeals, pp. *3 and *4. Freeman Keyes, not Krueger, was voting trustee.) (R. Ap. I, 96.)

"The purchase option expired August 31, 1958 without being exercised. The return of Schepp to control of the corporation at the February 1959 annual meeting was assured by reason of his control of the voting stock. There were various negotiations for the purchase from or sale to Schepp of the capital stock of the corporation. Traylor was willing to pay $10.00 a share for the stock." (C. A. Opinion *4.)

The Court of Appeals wholly ignores the tenor of these "various negotiations." In August 1956 Traylor requested an agreement that Schepp pay the Traylor indebtedness (over $400,000) and buy the minority stock at $10 per share — ($335,000.). On failure to produce this money, the Schepp 15,000 shares should be sold to Traylor for $150,000. (R. Ap. I, 43, 44, 72.)

In November 1958 Rex Schepp attempted to call a Stockholders' Meeting. (R. Ap. I, 72.) Traylor told Schepp if he could call off the meeting he would give him two or three weeks to sell the station, otherwise he would file receivership or bankruptcy proceedings. (R. Ap. I, 58, 73.) November 12, 1958 Traylor threatened bankruptcy or receivership unless Schepp produced around $450,000 and bought his stock at $10.00 per share. (R. Ap. I, 73.) Traylor told Schepp's attorney that he wanted receivership before the annual meeting in February. (R. Ap. I,

59; 60.) Traylor's attorney told Schepp's attorney that if Schepp would defer the annual meeting 30 to 50 days, *or would sign a buy-sell agreement*, he would defer filing for receivership. (R. Ap. I, 60.)

On the eve of the filing of the petition for reorganization, in response to a request by Schepp to meet with prospective purchasers, Early told Schepp: "You've got about 30 minutes or an hour to come over here and give that option; otherwise, we are going to file that bankruptcy matter." (R. Ap. I, 74.)

That this pressure was being applied on behalf of Krueger, Moser, and Keyes and not merely Traylor is made clear by the written buy-sell proposal made *after* filing the reorganization petition, by which it was proposed *to dismiss* the petition if Schepp would produce cash to pay Traylor's claims ($406,000 plus interest), $43,000 of other indebtedness of the debtor, buy *all* "minority" stock including that of Traylor, Krueger, Moser and Keyes for $350,000; or agree to sell the Schepp stock for $150,000 less one-half the costs accrued in reorganization and all costs over $3750.00. (R. Ap. I, 44, 98, 99, 100.) Dec. 23, 1958 Traylor, Krueger and Moser, as directors voted to file a consenting answer in the reorganization. (R. Ap. I, 93-95.)

The petition for reorganization was filed Dec. 19, 1958 and a receiver appointed Dec. 22, 1959. (R. Ap. I, 1.) Before Dec. 31, 1958 an answer, *confessing* the petition and *consenting* to approval, purporting to be authorized by the debtor's directors, was signed and verified by O'Daniel and filed by counsel whose employment was made by the same resolution. (R. Ap. I, 18, 19.) December 30, 1958 petitioner Rex Schepp filed a stockholders' controverting answer (R. Ap. I, 1) in which he charged *inter alia* that Ferris Traylor, O'Daniel and Krueger, as directors, had combined to cause the petition to be filed to defeat his (Schepp's) rights as a stockholder. (R. Ap. I, 14.)

December 31, 1958 hearing was had on the petition and consenting answer but no hearing was had on Schepp's controverting answer. (R. Ap. I, 16.) On January 2, 1959, the District Court entered his order approving the petition on the basis of the *consenting* answer. (R. Ap. I, 20.) The order does not even mention Schepp's controverting answer as then on file.

Thus the District Judge, without hearing, deliberately prejudged the validity of the consenting answer. More importantly, he ignored the absolute lack of good faith which would be manifest upon proof of the charge that Traylor (petitioning creditor) had combined with other directors to file the reorganization petition, and thereby prejudged that issue. In so doing the District Judge also ignored the admonition of Section 144 (11 U. S. C. 544) of the Bankruptcy Act, which plainly prescribes that issues made by a stockholder's answers including absence of good faith, shall be heard and determined before approving a petition.

It was later abundantly proved as hereinbefore shown, that Ferris Traylor, John Moser, John W. Krueger and Freeman Keyes had combined to obtain the controlling Schepp stock or otherwise oust Schepp's control, and that the reorganization petition was one of the means used to further that combination.

Supported by False Affidavits.

Producers, Inc. alleged in the petition that it was the holder of 27 demand notes aggregating $300,000 in principal amount (R. Ap. I, 5-6) originally executed to Ferris Traylor and by him indorsed to Producers on Nov. 20, 1958. (R. Ap. I, 10.) Producers was thus a "petitioner in involuntary proceedings whose claim rested upon assignment or transfer from" another person within the mean-

ing of General Order 5(2), 267 U. S. 613. To comply with G. O. 5(2) Producers, et al. filed the affidavit of Denis Stallings which asserted that these notes "were not purchased for the purpose of instituting a bankruptcy proceeding": that they had been assigned "in consideration of $300,000 being paid by Producers, Inc. to Traylor Bros., Inc. for the account of said Ferris E. Traylor"; and "the facts stated herein are personally known to affiant." (R. Ap. I, 11.)

This affidavit was later proved to be false in at least two respects. Stallings did not *personally* know *any* of the facts stated. (R. Ap. I, 35, 37.) He relied upon information furnished by counsel for petitioning creditors (Mr. Early and Mr. Gesas) who assured him that the statements were true and requested him to sign the affidavit. (R. Ap. I, 36.)

The statement that the consideration was $300,000 "paid" by producers to Traylor Bros. was likewise false. Traylor himself testified that the true consideration was a *book credit* to Traylor Bros. on Producers' books of account. (R. Ap. I, 40.) Traylor's own (G. O. 5-2) affidavit (R. Ap. I, 31) filed after the falsity of Stallings was demonstrated, was also false. *In the affidavit* he swore that "the true consideration was $300,000 *paid* by Producers, Inc. to Traylor Bros., Inc." (R. Ap. I, 31.) *In oral testimony* he swore that Producers debited Notes Payable and credited Traylor Bros.

His avowed "purpose" was to obtain tax money. (R. Ap. I, 40.) No evidence was introduced that any money was ever actually paid to Traylor Bros. or even Traylor himself, or any explanation of the "double play" when apparently a direct transfer to Traylor Bros. would have produced the credit, though of course it would have reduced the potential number of petitioning creditors to two.

Concerning this falsification the Court of Appeals said:

> "The incident of the affidavit, which was corrected by a new affidavit, in our opinion had no bearing on the issue of good faith either as to the objective of the proceeding or intention of the petitioners." * * (C. A. Opinion 26.)

There Were at Best Only Two Creditors Filing the Original Petition.

Wholly apart from the fact that the three corporations who joined in the original petition were in fact a single enterprise, under the control of Ferris Traylor, evidence adduced by petitioning creditors showed that one of these three was not a creditor of Evansville Television, Inc. The claims of both Traylor Bros., Inc. and Industrial Contractors, Inc. were for work done or performed and materials furnished at the special instance and request of the debtor. (R. Ap. I, 6.)

As to this "special instance and request" Mr. Traylor testified: "Mr. Schepp asked me and specifically Traylor Bros. to take charge of this construction work, and thereafter Industrial Contractors became a subcontractor under Traylor Bros." (R. Ap. I, 43.)

Since a subcontractor on a building is obviously not a creditor of the owner,* attempt was made to establish an implied contract with Industrial.

> "Industrial Contractors, Inc., a petitioning creditor, is a corporation engaged in the plumbing, heating and air conditioning and roofing business. The debtor corportation through its chief engineer issued direct orders to it for work and materials which were performed and furnished, and for which it issued invoices directly to the debtor corporation. The amount of its claim is $41,163.53." (C. A. Opinion *4.)

* At least not in Indiana. *The Lake Erie, Wabash & St. L. R. R. Co. v. Eckler* (1859), 13 Ind. 67, 68.

The record shows that no implied obligation to pay for work and material could have thus arisen. On September 24, 1956 the debtor's directors had unanimously resolved that no officer, agent or employee of the corporation should make, enter into or execute any contract, agreement, or understanding without first obtaining the directors' approval. (R. Ap. I, 91.) Work ordered from and done by Industrial was all ordered and done subsequent to Sept. 24, 1956; the earliest invoice being March 29, 1957. (R. Ap. I, 38, 93.) The directors never authorized a contract with Industrial. Industrial Contractors, Inc. was not a creditor of the debtor. Whatever was due on its claims was due Traylor Bros.

An Unsolicited Injunction Aided the Perpetuation of Minority Control.

After the approval order of Jan. 2, 1959, Benjamin F. Shepp filed a stockholders' controverting answer under Bankruptcy Act § 137 (11 U. S. C. 537).

Before hearings began on the stockholders' answers, Rex Schepp requested permission to use the debtor's office for holding a stockholders' meeting. (R. Ap. I, 2, 3.) The Trustee opposed granting this permission, but nowhere requested that the holding of the meeting be enjoined. (R. Ap. IV, 1-5.) Nevertheless, on Feb. 10, 1959, without prior application for an injunction, without any notice that an injunction might issue, without any intimation that an injunctive order was being considered, the District Judge entered an order "That no meeting of the stockholders be called or conducted for the purpose of electing new Directors until further order of the Court." (R. Ap. I, 27.) Motion to dissolve this injunction was promptly made. (R. Ap. I, 28.) It is undetermined as of the present time.

After the District Judge concluded the protracted hearings on the stockholders' answers and entered his final order of Feb. 12, 1960 (R. Ap. I, 86), the notice of appeal specified this injunctive order. (R. Ap. I, 90.)

The Court of Appeals held that an appeal from this injunctive order could not be taken on appeal from the final decree approving the petition, but only within the 40 days prescribed by Bankruptcy Act § 25 (11 U. S. C. 48). Opinion C. A. *9, *10.

Intervenors to the Rescue.

The application of Red Spot Paint and Varnish Co., *et al.* (hereinafter called Intervenors) to intervene *as additional petitioning creditors*, was filed March 5, 1959, and intervention was granted April 2, 1959. (R. Ap. I, 1, 2.) The original petition of Producers, *et al.* had been approved and a trustee appointed two months previously. (R. Ap. I, 20.) The following allegations of this verified petition were manifestly false, viz:

> "No other petition . . . against the debtor is pending under Chapter X." (R. Ap. I, 52.)

This intervention was allowed after it had been demonstrated, as hereinbefore stated, that Industrial was not a creditor, and that the G. O. 5(2) affidavits filed in support of Producers' claim were false.

The Appeal from Orders of Allowance.

The original petition was approved and the Trustee appointed Jan. 2, 1959. Hearings on the Stockholders' answers which demanded dismissal of the petition were not concluded until Jan. 7, 1960. (R. Ap. I, 2.) Meantime the District Court made various allowances of compensation to the Trustee and his counsel. The first of these

petitions for allowance having been set for hearing May 22, 1959, Rex Schepp and Benjamin F. Shepp, conceiving that the Court could not rightfully make allowances from the assets of the debtor in a Chapter X proceeding which should previously have been dismissed, objected to the making of any allowances and moved (1) to require security for repayment of any allowances made, and (2) forthwith to dismiss the petition and return to the debtor the assets in the hand of the Trustee. (R. Ap. I, 53.) The motion was denied. At this time allowances totaling $12,538.68 were made to Trustee and counsel. (R. Ap. I. 2.) In October, 1959 a similar motion and ruling were made. (R. Ap. I, 64.) These orders, as well as one made Nov. 17, 1959 were specified in the Notice of Appeal. (R. Ap. I, 90.) Appeals from these orders were dismissed as untimely before argument. (Opinion, C. A. *2 footnote.) Appeal from these orders was sought in order to avoid the possibility that they might obstruct restitution to the debtor of the diminution of its assets resulting from a wrongful reorganization proceeding. That such right of restitution will exist if this petition is ordered dismissed is indicated by *Northwestern Fuel Co.* v. *Brock* (1891), 131 U. S. 218, 219.

REASONS FOR THE ALLOWANCE OF THE WRIT.

I.

By the acceptance of a debtor's consenting answer, voted by a board of directors who were actively allied with the petitioning creditors in a scheme to use the process of the Bankruptcy Court to wrest control of the debtor corporation from the lawful holders of majority voting stock, as sufficient basis for the approval of a Chapter X reorganization petition, the Court of Appeals has rendered a decision in conflict with the decision of this Court in *Pepper* v. *Litton* (1939), 308 U. S. 295.

The threat of this Chapter X proceeding, and finally its actual filing, was used by Traylor, Moser, Krueger, *et al.* to coerce the Schepp majority either to buy minority stock and Traylor's claims or to sell the voting control at Traylor's own price. Traylor, through his *alter ego* corporations, became petitioning creditor. Traylor, Moser, and Krueger used their offices as debtor's directors to *confess* judgment of approval. By the decision in *Pepper* v. *Litton* a judgment *at law* so confessed by a corporate officer in his own favor as plaintiff may not even be recognized as a claim in bankruptcy. *Pepper* v. *Litton* (1939), 308 U. S. 295, 310-311. Here, we have the anomalous and topsy-turvy decision that such perversion of directors' functions may be made the basis of an adjudication under Chapter X.

II.

The recognition of this consenting answer voted by interested directors as a basis for the decree approving the petition and its perpetuation is also in conflict with the principles announced by this Court in *Geddes v. Anaconda*

Mining Co. (1921), 254 U. S. 590, 599, and with the principle more recently announced in *United States* v. *Mississippi Valley Generating Co.* (1961), 364 U. S. 520, 81 S. Ct. 294. The principle which forbids such action is identical with that of the statute involved in the case last cited; namely:

> "The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. * * *"

The Court of Appeals ignores the existence of the Traylor, Moser, Krueger disqualification to act for the defendant debtor with respect to litigation in which they were personally interested on the side of the plaintiffs (petitioning creditors) saying:

> "The consenting answer of the corporation is as equally attributable to the bona fide basis for seeking corporate reorganization as it is to a plan to coerce surrender of majority control to a minority group." (Op. C. A. 6.)

Directors using the reorganization process as a club to coerce purchase of their own individual corporate claims or surrender of controlling stock were personally interested in the matter upon which they voted, and therefore disqualified to vote at all. *Geddes* v. *Anaconda Mining Co.* (1921), 254 U. S. 590, 591.

III.

The recognition of this collusive consenting answer by the rendition and perpetuation of a decree of approval based thereon was a decision in conflict with the principle announced by this Court in *Harkin* v. *Brundage* (1927), 276 U. S. 36 which requires a Federal Court to relinquish a receivership otherwise unassailable, obtained by fraudu-

lently delaying a state court proceeding, and fraudulent misrepresentation to the Federal Court of the status of the state court proceeding.

Here, presenting as the act of the debtor a confession of judgment voted by interested directors was a palpable fraud on the Court. Upon discovery of this fraud it was the District Court's duty to dismiss the petition for reorganization. This results *a fortiori* from the requirement of § 146 of the Act (11 U. S. C. § 546) that a Chapter X petition must be filed in good faith.

IV.

The decision of the Court of Appeals that the presentation of an affidavit, known to contain material falsehoods, in support of a Chapter X reorganization petition does not conclusively negative the "good faith" requirement of 11 U. S. C. 146, constitutes the erroneous decision of an important question involving the application of Chapter X of the Bankruptcy Act which should be decided by this Court.

Since 1925, petitioning creditors whose claims are held by assignment or transfer from others have been required by G. O. 5(2) to file with the petition an affidavit stating the true consideration, and whether or not the claim was acquired for the purpose of instituting a bankruptcy proceeding. G. O. 5(2) 267 U. S. 613. Since the enactment of former § 77b, now embodied in 11 U. S. C. § 546, a reorganization petition shall be deemed not to be filed in good faith if the petitioning creditors have acquired their claims for the purpose of filing the petition.

By reason of G. O. 5(2) involuntary petitioners under Chapter X must convince the Court *in limine* that they have *not* acquired their claims for the purpose of the petition. Positive assertion upon personal knowledge is of course more convincing than one made on information and belief.

Stallings' false assertion of personal knowledge in the G. O. 5(2) affidavit (R. Ap. I, 11, 35, 36) was therefore a material falsehood. It was false swearing which was even perjurious under the decisions of this very Court of Appeals. *United States* v. *Henderson* (7th C. A. 1950), 185 F. 2d 189, 191; *United States* v. *Hendrickson* (7th C. A. 1952), 200 F. 2d 137, 139. In Kentucky this positive oath, without personal knowledge, would have been perjurious, even if the statement were in fact true. *Commonwealth* v. *Miles* (1910), 149 Ky. 577, 149 S. W. 385, 386. In the United States Courts of the Seventh Circuit, this type of prevarication is seemingly a harmless peccadillo.

Since this false swearing was not only known to, but actually procured by counsel for petitioning creditors (R. Ap. I, 36) it was clearly attributable to the petitioning creditors. *Harkin* v. *Brundage* (1927), 276 U. S. 36, 51.

Further falsehood appears in Stallings' original and in Traylor's substitute affidavit. The true consideration was *not* "$300,000 being paid by Producers, Inc. to Traylor Bros., Inc." The *true* consideration was merely a book credit to Traylor Bros. on Producers' books and a like credit to Traylor on Traylor Bros.' books. To assert that $300,000 was paid, when in truth it was only promised was both *suppresio veri*, and *suggestio falsi*. *No one* received a payment of $300,000. Traylor, not Traylor Bros., was "paid" by the book credits. Certainly, the *true* facts, not counsel's misleading interpretation, had important bearing both on the purpose of the acquisition and the *bona fides* of the ownership.

Thus the Court of Appeals has held that a creditor who knowingly submits false and misleading evidence to establish his good faith, may nevertheless be absolved from the *mala fides* conclusively established by such corrupt conduct. This decision conflicts directly with the rationale of the decision in *Keystone Driller Co.* v. *General Excavator Co.*

(1933), 290 U. S. 240, 247. In that case the use of prior adjudications which had been obtained by corrupt suppression of evidence was held such unconscionable conduct as to bar relief in equity. Here there was not merely suppression but falsehood, in the very case in which petitioners were required to establish "good faith". The decision of the Court of Appeals in this case is an open indorsement of chicanery.

Such perversion of both G. O. 5(2) and Section 146 (11 U. S. C. 546) of the Bankruptcy Act should be condemned by this Court.

V.

The Court of Appeals has decided that creditors intervening in an involuntary reorganization proceeding under Chapter X of the Bankruptcy Act after the initial adjudication and appointment of a trustee but before the conclusion of hearings on stockholders' answers prescribed by 11 U. S. C. 544, and after the discovery that the original petition was deficient, both as to number of creditors and good faith, may nevertheless be counted as petitioning creditors to supply the deficiency in number and lack of good faith.

We believe this to be a palpably erroneous decision of an important question which has not been, but should be decided by this Court.

Three creditors intervened "as additional petitioning creditors" after evidence that the three original petitioning creditors were in fact one (not three), that one of them (Industrial) was not in fact a creditor, that one of them had knowingly filed a false G. O. 5(2) affidavit, and that the original petition was part of a plan to coerce the majority stockholders to purchase the stock and claims of the minority or sell out. The Court of Appeals held that the

intervention of three new creditors somehow cured the defect of petitioners and absence of good faith, saying:

> "There is nothing to link the intervening petitioning creditors with what appellants assert was a plan by the minority to wrest control from the Schepps." C. A. Opinion *7.
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> "Assuming validity in any one of the three objections raised as to the status or qualification of the original petitioning creditors any deficiency so resulting was cured by the intervention." C. A. Opinion *8.

As to the right to count intervenors as additional petitioners to supply the defect in number, the Court of Appeals cited *Syracuse Engineering Co.* v. *Haight* (2nd C. A. 1940), 110 F. 2d 468 and 6 Collier Bankruptcy (14th Ed.) 1424-5.

The citation to Collier is based on the *Haight* case and the *Haight* case was a case of *ordinary* bankruptcy, not reorganization under Chapter X. It simply announces the construction of § 59(f) of the Bankruptcy Act (11 U. S. C. 95f) established by this Court in *Canute S. S. Co.* v. *Pittsburg & W. Va. Coal Co.* (1923), 263 U. S. 244. The last cited case (before 77b or Ch. X ever existed) held that § 59(f) is a section "supplementing and modifying the provisions of 59(b) in this respect."

Section 59(b) of the original Bankruptcy Act (11 U. S. C. 95(b)) corresponds to § 126 (11 U. S. C. 526) of Ch. X. Section 59(f) of the original act reads: "f. Creditors other than original petitioners may at any time enter their appearance and join in the petition." 11 U. S. C. 95(f). The intervention section following 11 U. S. C. 526 is 11 U. S. C. 607 which provides that "the judge may, for cause shown permit a party in interest to intervene generally or with respect to any specified matter." The difference in language is significant. Nothing in 11 U. S. C. 607 even

suggests that such intervenors may "join in the petition." It is perhaps significant that the same Court which decided the *Haight* case says that 11 U. S. C. 607 does not permit *intervention* by either creditors or stockholders. *Rudnick v. Coney Island Boardwalk Corp.* (2nd C. A. 1950), 181 F. 2d 775, 776.

No district court or Court of Appeals has held that 59(f) which permits new creditors to join in a bankruptcy petition *before* adjudication, applies to interventions in reorganization proceedings either before or after adjudication. At least two district courts have held the contrary. *In Re Flour Mills of America, Inc.* (D. C. Mo., 1939), 27 F. Supp. 559, 561. *In Re Associated Gas and Electric Co.* (D. C. N. Y. 1936), 14 F. Supp. 582, 583, 584.

Under general principles, delayed intervention cannot validate a proceeding defective in its inception even though the intervenors might have then brought an effective new proceeding.

In *U. S. ex rel. Texas Portland Cement Company v. McCord* (1914), 233 U. S. 157, 163, it was said:

> "* * * These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit. No service was made or attemtped to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit." (pp. 163-164.)

The mischievous results of the decision on intervention are nowhere better illustrated than here. An unscrupulous

coalition of creditors and stockholders, by means of one false affidavit, one unfounded creditor's claim (Industrial), a show of three creditors in fact one, and a pretended consent voted by members of the coalition, having prevailed upon the District Judge to hamstring the debtor by receivership and the appointment of a trustee; other creditors not previously connected with the coalition are permitted to administer the death stroke. Under such conditions the "good faith" requirement of 11 U. S. C. 146 becomes a mockery.

VI.

By its decision on intervention the Court of Appeals tacitly decided that three separately incorporated companies in fact subject to a single will because of unitary control might nevertheless be counted as three creditors for the purpose of an involuntary petition for corporate reorganization.

We believe this to be the erroneous decision of an important question of the interpretation of § 126 of the Bankruptcy Act (11 U. S. C. 526) which has not been but should be decided by this Court.

Unless the three creditors who must concur in the desirability of instituting reorganization proceedings are *capable* of making a different and divergent decision, the requirement of *three* creditors (rather than one) becomes meaningless. It is not enough that separate legal titles to the separate claims exist. We suggest that this is the true rationale of such cases as *Stroheim et al. v. Lewis F. Perry & Whitney Co. et al.*, C. C. A., 1st C. (1910), 175 Fed. 52, 53.

In the above case two creditors holding promissory notes of which the third creditor's sister was the beneficial owner, were counted as one, not two. Obviously, they could

have brought separate actions at law. But neither of them was *able* to make an independent decision as to the desirability of bankruptcy. They were subject to a single will.

VII.

In dismissing the appeal from the injunctive order of Feb. 10, 1959, which was filed with the appeal from the final decree of Feb. 12, 1960, on the ground that it was not filed within the time allowed by 11 U. S. C. 48, the Court of Appeals decided, and we believe erroneously, that an interlocutory injunction in the course of bankruptcy proceedings must be appealed within 40 days of its rendition or not at all, and that unlike interlocutory orders in equity, it is not reviewable on appeal from the final decree.

We do not believe this precise question has been decided by the Supreme Court or any Court of Appeals.

However, the Court of Appeals for the Eighth Circuit has held that old Judicial Code § 129, (now 28 U. S. C. 1292) which first gave the right to appeal from certain interlocutory orders in equity, did not abolish the existing right to review such orders on appeal from a final decree. In *A & R Realty Co.* v. *Northwestern Mutual Life Ins. Co.* (8th C. A. 1938) 95 F. 2d 703, 707, the Court said:

> "2. The order appointing the receiver was not appealable after 30 days from the time it was entered, but is reviewable upon the appeal from the final decree. The entry of the order is assigned as error. Section 129 of the Judicial Code, as amended, 28 U. S. C. § 227, 28 U. S. C. A. § 227, permits an appeal from an interlocutory order within 30 days. Prior to the time that appeals from interlocutory orders were authorized, such orders were only subject to review upon appeal from final decrees. In *Marden* v. *Campbell-Printing-Press & Mfg. Co.*, 1 Cir., 67 F. 809, 816, this was pointed out, and it was held that the right granted by Congress to appeal from interlocutory

> orders is a privilege or option, and that, whether that right is availed of or not, the right to appeal from the final decree is not diminished. It would have been more accurate to say that if the right to appeal from the interlocutory order was not availed of, the failure to appeal would not diminish the right to a review of such order upon appeal from the final decree. * * *"

We submit that the same rule should apply in Bankruptcy since the amendment of § 47 (11 U. S. C. 47) to permit appeals as of right from *all* orders, except those demonstrably involving less than $500.00.

Since both the injunctive order of February 1959 and the final order of February 1960 were appealable as of right, there appears to be no reason why the 1959 interlocutory order should not be appealable with the final order.

VIII.

In applying to the orders of allowance made in this proceeding the inflexible time limit for appeal prescribed by § 250 of the Act (11 U. S. C. 650) we believe that the Court of Appeals has erroneously decided an important question not previously decided by this Court.

In this proceeding, although the petition had been approved Jan. 2, 1959, this approval actually remained *in fieri* and subject to be set aside until February 12, 1960. Accordingly, during this period, the Trustee had exactly the status of a receiver, *pendente lite*, and intervening interlocutory orders should be appealable with appeal from the *final* order confirming the appointment, under the rule announced in *A & R Realty Co.* v. *Northwestern Mutual Life Ins. Co.* (8th C. A. 1938), 95 F. 2d 703, 707.

Section 250 (11 U. S. C. 650) should only be applied to orders made after *final* approval of the petition, during the process of reorganization.

IX.

The following actions of the District Judge, sanctioned by the Court of Appeals constitute such a departure from the accepted course of judicial proceedings as to call for supervision by the Supreme Court:

(1) The district judge approved this Chapter X reorganization petition and appointed a trustee upon a consenting answer, when there was pending and undetermined a stockholders' answer which charged that the consenting answer was the product of a collusive combination between the debtor's directors and the petitioning creditors.

In so doing the district judge disregarded the express mandate of § 144 of the Act (11 U. S. C. 544) to hear such answers "as soon as may be". He also prejudged the issues made by the stockholders' answer in such a way as rendered him incapable of fairly hearing either these issues or those subsequently tendered by another stockholders' answer. Unconsciously, if not consciously, the district judge was bound to want to confirm (rather than undo) the step he so hastily and improvidently took.

(2) The district judge arbitrarily came to the aid of the petitioning creditors and corporate directors then charged (and later proved) to be in collusion with the petitioning creditors, by arbitrarily enjoining the majority stockholders from calling or holding a stockholders' meeting, without prior application for such injunction, without notice that an injunctive order was being considered, without affording opportunity to be heard, and in short, without any semblance of due process of law.

McVeigh v. *United States* (1870), 11 Wall. 259, 267.
Windsor v. *McVeigh* (1876), 93 U. S. 274, 277, 278.

(3) The district judge, after uncontradicted proof that a wilful and material falsehood had been included in an affi-

davit filed under G. O. 5(2), not only accepted an amended or substitute affidavit from the same creditor which was also demonstrably untrue, but also refused to recognize this false swearing as bearing upon the good faith of the petition.

Further elaboration is believed to be superfluous.

Petitioners pray that a Writ of Certiorari issue to review this judgment; that upon hearing of such writ the judgments of the District Court and of the Court of Appeals be reversed with directions that the debtor be restored to the possession of its assets in the custody of the trustee, and be made whole for the losses resulting from this proceeding.

PAUL Y. DAVIS,
Attorney for Petitioners Rex Schepp and Benjamin F. Shepp.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

September Term, 1960 — January Session, 1961.

In the Matter of
Evansville Television, Inc.,
Debtor.

No. 13024
Rex Schepp and
Benjamin F. Shepp,
Appellants.
vs.
Producers, Inc., *et al.*,
Appellees.

No. 13056
Stephen W. Langmade,
Appellant;
vs.
Producers, Inc., *et al.*,
Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Evansville Division.

No. 13168
Rex Schepp,
Petitioner.
vs.
Honorable Cale J. Holder, Judge of The United States District Court for the Southern District of Indiana, Evansville Division,
Respondent.

Petition for Writ of Mandamus and Prohibition.

January 5, 1961.

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge*. Rex Schepp and Benjamin F. Shepp, appellants, stockholders of Evansville Television Inc., seek by their appeal (No. 13024) to set aside an order of the District Court entered February 12, 1960, in a chapter X Reorganization Proceeding, 11 U. S. C. A. § 501 *et seq.*, which approved and declared filed in good faith a petition to reorganize the subject corporation.[1] The appeal also seeks reversal of a February 10, 1959 order enjoining the calling or conducting of a meeting of stockholders for the purpose of electing directors until further order of court.

The appeal (No. 13056) by Stephen W. Langmade, also a stockholder, seeks to set aside the order of February 12, 1960.[1]

The petition for reorganization of the subject corporation invoked the District Court's jurisdiction under 11 U.S.C.A. §§ 526, 530 and 531, was filed by creditors, and alleged insolvency and the commission of an act of bankruptcy within the preceding four months. The debtor corporation filed a consenting answer. Appellants Rex and Benjamin Shepp each filed a controverting answer. The District Court, after hearing evidence, made findings of fact and entered its conclusions of law on which the order of February 12, 1960, is based.

The appeals present the following contested issues:

(1) Whether the provision of 11 U. S. C. A. § 526 which authorizes the filing of a petition for reorganization by "three or more creditors" was satisfied.

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1. By their respective Notices of Appeal appellants included certain additional orders from which appeals were sought to be prosecuted. On motions of appellees the appeals from such orders were dismissed by this Court as untimely.

(2) Whether the subject corporation was insolvent.

(3) Whether the petition was filed in good faith.

(4) Whether a timely appeal was perfected from the injunctive order and, if so, did the court err in entering such order.

The debtor, Evansville Television, Inc., was incorporated in 1951 with authorized capitalization of 25,000 shares of Class A no par voting stock and 25,000 shares of Class B

equally participating no par non-voting stock. It is engaged in the operation of a television broadcasting station in Evansville, Indiana, under a temporary permit granted by the Federal Communications Commission on the VHF Channel 7, and is known as Station WTVW. The station began broadcasting in August of 1956. It was one of four applicants in 1952 for the one VHF channel in Evansville. It was awarded the channel on December 27, 1955. During pendency of the application others obtained construction permits for two UHF channels, one in Evansville and one in Henderson, Kentucky, and began broadcasting in 1953. Upon the grant of the VHF permit to the debtor corporation both UHF stations petitioned the Commission to revoke it on the basis that the superior signal would cause them great economic injury. These petitions were denied but there is pending before the Commission a Rule to Show Cause why the corporation should not be required to relinquish its temporary VHF permit and receive a UHF permit in lieu thereof.

At the time construction was authorized and the temporary VHF permit issued in December of 1955 Rex Schepp, his wife, Mary Eaton Schepp, and his brother, Benjamin F. Shepp held approximately 72% of the corporation's stock, including 16,875 shares of the Class A voting stock.

Ferris E. Traylor, Freeman Keyes and John B. Moser, executor, held a total of 4,125 shares of Class A and 3,158 of Class B stock; various others, smaller amounts. All stockholders except the Schepps[2] were obligated on unpaid stock subscriptions. As a condition of paying the balance of their subscriptions Traylor, Keyes, Moser and another stockholder, Krueger, required a reallocation of the Schepp stock interest, a voting trust to control election of directors, and a buy-sell agreement. The agreement reduced the Schepp holdings to 15,000 shares of Class A stock, gave the minority group the option to purchase the Schepp stock at appraised value (not less than $15.00 per share) exercisable two years and ten days after WTVW went on the air, and placed all voting stock in the hands of Krueger, as trustee, to vote for a board of directors consisting of Rex Schepp and four members of the minority group, which was to continue until the option expired.

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Schepp was made president and employed as general manager of the corporation. He had had previous experience in the television field. Station facilities were constructed and WTVW went on the air in August of 1956. In November of 1956 Schepp was discharged as president and general manager. The reasons given, as shown in the corporation's minutes, were disloyalty, unfaithfulness, neglect of duties, wilful mismanagement and harassment of employees resulting in inefficient operation.

The purchase option expired August 31, 1958, without being exercised. The return of Schepp to control of the corporation at the February 1959 annual meeting was assured by reason of his control of the voting stock. There

2. The Schepps had received an aggregate of $150,000.00 of stocks for services and expenses.

were various negotiations for the purchase from or sale to Schepp of the capital stock of the corporation. Traylor was willing to pay $10.00 a share for the stock.

Producers, Inc., one of the petitioning creditors, is a corporation to which the debtor corporation owes $300,000.00, plus interest, as evidenced by twenty-seven promissory notes. The notes were originally given to Ferris E. Traylor for loans and advancements made to the corporation when money was immediately needed, at most times to cover overdrafts, between December 12, 1956 and May 9, 1958. Traylor assigned them to Producers, Inc., on November 20, 1958.

Traylor Bros., Inc., a petitioning creditor, is a corporation engaged in the construction business. Schepp, while president, hired it in connection with the construction of the station facilities and improvement of its studios. The claim of Traylor Bros., Inc., in the amount of $65,675.15 is for work performed and materials furnished.

Industrial Contractors, Inc., a petitioning creditor, is a corporation engaged in the plumbing, heating and air conditioning and roofing business. The debtor corporation through its chief engineer issued direct orders to it for work and materials which were performed and furnished, and for which it issued invoices directly to the debtor corporation. The amount of its claim is $41,163.53.

The stock ownership of Traylor Bros., Inc., is 50% in Ferris E. Traylor and 50% in his brother. The stock of Producers, Inc., is similarly owned. Traylor and his brother each own 25% of the stock of Industrial Contractors, Inc.,

and the remainder is held by employees of the three companies.

Other creditors, who were permitted to intervene as peti-

tioning creditors, are Carl Wolfe, d/b/a Ohio Valley Sound Co., Smith and Butterfield, Inc., and Red Spot Paint and Varnish Company, Inc.

The petition for reorganization was filed December 19, 1958.

The District Court, after exhaustive hearings extending over a period from February 26, 1959 to January 7, 1960, found and concluded that the corporation was insolvent and that the petition for reorganization was filed in good faith. In so far as these determinations rest on factual considerations they are not to be disturbed on review unless clearly erroneous. The District Court is charged with the duty of ascertaining the existence or non-existence of the fact. *In Re Loeb Apartments*, 7 Cir., 89 F. 2d 461, 463.

We have carefully reviewed the record and are of the opinion that the finding of insolvency is supported by substantial evidence including the testimony of an expert witness in the field of evaluating television and radio properties and that of a certified public accountant who had made extensive examination of the corporation's records. The evidence was ample that the corporation's assets were insufficient to meet its liabilities.

This Court had occasion to consider the criteria by which the "good faith" requirement in chapter X proceedings is to be determined in *In Re Diversey Hotel Corporation*, 7 Cir., 165 F. 2d 655, 658. It was there pointed out that what is meant in chapter X by "good faith" is not the same as breach of fiduciary integrity but is a restriction on the use of this remedy to prevent its misuse. And it was pertinently observed that the District Court, charged with the duty of preventing this misuse being "in a favored position, it can well judge of the disposition and intent of those who knock at its door and seek admission."

There was testimony that the corporation had never

had an annual profit, could not even approximate the payment of current liabilities, that attempts to get financing had been going on for two years with no avail and that the corporation was "at the end of its rope" in so

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far as borrowing money was concerned and could not go forward without reorganization. Traylor, who had advanced $300,000.00, testified that he would not "put another dollar in the situation" without revision of the stock situation and capital structure. It is evident that there was a basis on which the District Court's jurisdiction under chapter X could have been invoked in "good faith". And it is equally deducible from the record that the relationship between Traylor and Schepp if not acrimonious was at least unharmonious. Traylor was frank in admitting that an additional reason for the petitioning creditors filing the proceeding was "[t]he Schepp interests coming back into control of the corporation and in my opinion endangering the loans by upsetting the present management of the corporation".

Appellants contend that the primary if not the sole reason for the filing of the petition was to wrest control from the Schepps. They urge, in effect, that we disregard the existence of the bona fide grounds for corporate reorganization and find clear error in the District Court's finding of good faith. In this connection we are importuned to accept as justification of such action factors such as the execution of a supporting affidavit filed with the petition on "personal knowledge" by an affiant who it later developed did not have personal knowledge of the fact sworn to; the filing of a consenting answer of the corporation by a board of directors which included Traylor and the majority of which did not favor control of the corporation by the Schepps; attempts of Traylor and other

minority stockholders to induce the Schepps to buy out Traylor's claims and the minority stock or sell the Schepp stock to them; and Traylor's transfer of the corporation's notes to Producers, Inc.

The incident of the affidavit, which was corrected by a new affidavit, in our opinion had no bearing on the issue of good faith either as to the objective of the proceeding or intention of the petitioners. The consenting answer of the corporation is as equally attributable to the bona fide basis for seeking corporate reorganization as it is to a plan to coerce surrender of majority control to a minority group. The various negotiations relating to buy-sell agreements were, of course, attempts by Traylor as a major creditor (or as owner of a substantial interest in corpo-

rations which were major creditors) to collect the debt owed him and dispose of his interest or to retain a voice in the management of this corporation in which he had a heavy financial interest as such creditor. The fact that he offered $10.00 a share for the Schepp stock in an effort to protect his heavy investment is not indicative that he regarded the corporation solvent at the time but rather an expression of confidence as to the future of the corporation premised on his purchase of the Schepp stock and the latter's consequent disassociation from management. Appellants' contention that Traylor's assignment of the $300,000.00 in notes of the corporation to petitioning creditor, Producers, Inc., in and of itself establishes lack of good faith in the filing of the petition is based on the provision of 11 U. S. C. A. § 546(1) that a petition shall be deemed not to be filed in good faith if "the petitioning creditors have acquired their claims for the purpose of filing the petition." But the only evidence presented on the purpose

of the transfer[3] was that of Traylor who testified that the assignment was made so he could secure funds to settle a personal income tax situation.

Traylor's dissatisfiaction with Schepp management may well have motivated his actions to insulate his investment from its resumption of control but under the circumstances here present we cannot say that the District Court was clearly in error in finding that the petition was filed in good faith. Here was an insolvent corporation with but a temporary permit to pursue the activities upon which its financial existence depended. And it was unable to obtain needed financing. The major creditors expressed willingness to convert their claims into stock to provide a financial structure which would enable borrowing. In addition there is nothing to link the intervening petitioning creditors with what appellants assert was a plan by the minority to wrest control from the Schepps. The District Court was justified in approving the petition and awaiting the facts that arise from a plan of reorganization. That plan must be fair and equitable, and feasible. 11 U. S. C. A. § 621 (2).

We find other arguments of appellants addressed to the issue of good faith equally devoid of merit. On this phase

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of the matter we conclude that there was substantial evidence to support the findings of the District Court and from our review of the record we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395.

Further, we find no error in the District Court's refusal

3. Aside from the affidavit required by G. O. 5 and G. O. 52(2), 11 U. S. C. A. foll. § 53, supporting the claim of Producers, Inc., to the effect that the notes were not purchased for the purpose of instituting the proceedings.

to admit and consider evidence concerning the terms, and rejection by Traylor, of an offer to purchase the minority group's stock and pay the debts owed the corporations in which Traylor was interested. These negotiations occurred during a recess in the proceedings pursuant to the court's suggestion that a compromise settlement be attempted. Counsel for petitioners expressly conditioned undertaking compromise discussions on the understanding that "it will not be used as evidence in this matter."

Appellants raise a question as to whether the petition was filed by the requisite number of creditors. Under the provisions of 11 U. S. C. A. § 526 which are here pertinent an involuntary petition for corporate reorganization if filed by creditors requires "three or more creditors". Appellants argue that Traylor's stock interest in Producers, Inc., Traylor Bros, Inc., and Industrial Contractors, Inc., requires, that for the purpose here involved, the three corporate entities must be regarded as but one; that Industrial Contractors, Inc., was but a subcontractor of Traylor Bros., Inc., and not a creditor of the debtor corporation; and that in any event the work performed by Industrial was unauthorized and created no liability in the debtor corporation.

We find it unnecessary to consider any of these arguments. Three additional creditors filed a petition to intervene while the issues raised by the controverting answers were in the process of being heard. They alleged that it was for their best interests that the chapter X proceeding be maintained and requested permission to intervene as "petitioning creditors". The District Court granted the petition and we find no error in its so doing. Assuming validity in any one of the three objections raised as to the status or qualification of the original petitioning creditors any deficiency so resulting was cured by the intervention.

Such intervention is authorized under 11 U. S. C. A. § 607. *Seaboard Terminals Corp.* v. *Western Maryland Ry. Co.*, 4 Cir., 108 F. 2d 911, 914; and see dictum in *In Re Federal Facilities Realty Trust*, 7 Cir., 220 F. 2d 495, 500-501. We do not agree with appellants that 11 U. S. C. A. § 596 limits § 607 so as to authorize intervention only after approval of the petition. And where a creditor has been properly permitted to intervene he is to be counted in determining the existence of the requisite number of creditors. Cf. *Syracuse Engineering Co.* v. *Haight*, 2 Cir., 110 F. 2d 468; 6 Collier on Bankruptcy (14th ed.) 1424-5.

The February 12, 1960 order of the District Court approving and declaring the petition for reorganization filed in good faith is affirmed.

The injunctive order restraining the calling or conducting of a meeting of stockholders for the purpose of electing directors until further order of the court was entered February 10, 1959. The notice of appeal (13024) was not filed until February 23, 1960, more than one year later. Under 11 U. S. C. A. § 47 interlocutory or final orders in *proceedings in bankruptcy* as distinguished from "controversies arising in bankruptcy" are appealable. The injunctive order was a "proceedings in bankruptcy" order. *Albin* v. *Cowing Pressure Relieving Joint Co.*, 317 U. S. 211, 212. This Court has held that an order in a proceedings in bankruptcy from which an appeal may be taken, may be reviewed on appeal from that order only and may not be reviewed on an appeal from a subsequent order. In *In re Trust No. 2988 of Foreman Trust & Savings Bank, Debtor*, 7 Cir., 85 F. 2d 942, 943, we said:

> "An order in bankruptcy proceedings, from which either an absolute or discretionary appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. *Fon-*

tana Mercantile Co., Inc., 62 F. (2d) 1047 (C. C. A. 9); *Wheeler* v. *Smith*, 30 F. (2d) 59 (C. C. A. 9); *In re Kest*, 78 F. (2d) 705 (C. C. A. 2); *In re S. W. Straus & Co.*, 67 F. (2d) 605 (C. C. A. 2). Otherwise a party might permit the time within which to appeal from an interlocutory order to expire and then by an appeal from a final order, by indirection, achieve a review of something which it was not entitled to review."

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We adhere to the view above expressed. The time for appeal from the injunctive order ended not later than forty days after its entry. 11 U. S. C. A. § 48. The appeal in No. 13024 in so far as it purports to include the injunctive order of February 10, 1959 is dismissed as untimely.

No. 13168 is an application by Rex Schepp to this Court for a writ of mandamus and prohibition directed to the District Court ordering that no further action be taken to hear, consider or approve a plan of reorganization of the subject corporation until the appeal in No. 13024 is determined, to set aside and expunge the injunctive order of February 10, 1959, or to sustain a pending motion to vacate such injunction or to rule upon such motion. Apart from the question of the propriety and availability of the remedies petitioner seeks to employ for the purpose indicated under the particular circumstances here involved our disposition of the appeal in No. 13024 requires denial of the petition for writ of mandamus and prohibition. Our affirmance of the District Court's order of February 12, 1960 approving and declaring the reorganization petition filed in good faith makes moot the request that further action of the District Court be stayed pending disposition of that appeal. As to the relief sought with respect to the injunctive order of February 10, 1959 and the motion to vacate said injunction we are of the opinion that petitioner may not so use the writ of mandamus as a substitute for

the relief he failed to seek by a timely appeal. Nor does his petition set forth any change in circumstances in fact or law since entry of the order which establishes a clear legal right to vacation of such order. Consequently, we are of the opinion that petitioner has failed to demonstrate a right to compel the District Court to take the action he requests. The application for a writ of mandamus and prohibition is denied.

JUDGMENT ORDER APPROVING REORGANIZATION PETITION AFFIRMED; APPEAL FROM INJUNCTIVE ORDER DISMISSED; PETITION FOR WRIT OF MANDAMUS AND PROHIBITION DENIED.

APPENDIX B.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Thursday, January 5, 1961.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Win G. Knoch, Circuit Judge,
Hon. Latham Castle, Circuit Judge.

In the Matter of Evansville Television, Inc., Debtor.	
Rex Schepp and Benjamin F. Shepp, and Stephen W. Langmade, *Appellants*, vs. Producers, Inc., *et al.*, *Appellees*.	Appeal from the States District Court for the Southern District of Indiana, Evansville Division.
No. 13024-13056	

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order approving reorganization petition, in this cause appealed from be, and the same is hereby, AFFIRMED; and the appeal from the injunctive order of the said District Court be, and the same

is hereby, DISMISSED; in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs of these appeals be taxed against the respective appellants.

APPENDIX C.

STATUTES.

I.

Jurisdictional Statutes.

28 U. S. C. 1254(1).

"§ 1254. Courts of appeals; certiorari; appeal, certified questions—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

28 U. S. C. 2101(c).

"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay— * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree * * *"

11 U. S. C. 47(c).

"§ 47. Jurisdiction of appellate courts—

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. * * *"

II.

Other Statutes.

28 U. S. C. 1292.

"§ 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court:

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property:* * *"

Bankruptcy Act, § 59(b) and (f), 11 U. S. C. § 95(b) and (f).

"§ 59. Who May File and Dismiss Petitions.* * *

(b) Three or more creditors who have provable claims liquidated as to amount and not contingent as to liability against any person which amount in the aggregate in excess of the value of securities held by them, if any, to $500 or over, or, if all of the creditors of such person are less than twelve in number, then one or more of such creditors whose claim or claims equal such amount, may file a petition to have him adjudged a bankrupt. * * *

(f) Creditors other than original petitioners may at any time enter their appearance and join in the petition.* * *"

Bankruptcy Act § 126, 11 U. S. C. § 526.

"Sec. 126. A corporation, or three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000 or over,

liquidated as to amount and not contingent as to liability, or an indenture trustee where the securities outstanding under the indenture are liquidated as to amount and not contingent as to liability, may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter."

Bankruptcy Act § 136, 11 U. S. C. § 536.

"Sec. 136. Within ten days after the service of the subpoena and of a copy of the petition, or within such further time as the court may for cause shown allow, an answer controverting the facts alleged in the petition may be filed by the debtor."

Bankruptcy Act § 137, 11 U. S. C. § 537.

"Sec. 137. Prior to the first date set for the hearing provided in section 161 of this Act, an answer controverting the allegation of a petition by or against a debtor may be filed by any creditor or indenture trustee or, if the debtor is not insolvent, by any stockholder of the debtor."

Bankruptcy Act § 142, 11 U. S. C. § 542.

"Sec. 142. If an answer is not filed by a debtor to a petition against it, or if the answer filed does not controvert any material allegation of the petition, the judge shall enter an order approving the petition if satisfied that it complies with the requirements of this chapter and has been filed in good faith or dismissing it if not so satisfied."

Bankruptcy Act § 144, 11 U. S. C. § 544.

"Sec. 144. If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied

that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied."

Bankruptcy Act § 146 (1), 11 U. S. C. § 546(1).

"Sec. 146. Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if

(1) the petitioning creditors have acquired their claims for the purpose of filing the petition; * * *"

Bankruptcy Act § 161, 11 U. S. C. § 561.

"Sec. 161. The judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition; of which hearing at least thirty days' notice shall be given by mail to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate, and, if directed by the judge, by publication in such newspaper or newspapers of general circulation as the judge may designate."

Bankruptcy Act § 206-207, 11 U. S. C. § 606-607.

"Sec. 206. The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

"Sec. 207. The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given."

General Orders in Bankruptcy, 5(2), 267 U. S. R. 613.

"General Orders in Bankruptcy, Promulgated April 13, 1925.

It is ordered by the court that General Order in Bankruptcy No. 5, entitled "Frame of Petition," be amended by adding at the end thereof the following sentence:

Petitioners in involuntary proceedings whose claims rest upon assignment or transfer from other persons shall annex to one of the duplicate petitions all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof, and whether or not they were purchased for the purpose of instituting bankruptcy proceedings." * * *"

Bankruptcy Act § 250, 11 U. S. C. § 650.

"Sec. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Supreme Court of the United States

No. 814

BRIEF IN OPPOSITION FOR THE RESPONDENTS PRODUCERS INC TRAYLOR BROS INC INDUSTRIAL CONTRACTORS INC

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 814.

REX SCHEPP, AND BENJAMIN F. SHEPP,

Petitioners,

vs.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC.

OPINIONS BELOW

The opinion of the District Court has not been reported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 286 F. (2d) 65 (1961).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether the District Court and Court of Appeals were clearly erroneous in their concurrent finding that the Petition for Reorganization was filed in good faith.

2. Whether the provision of 11 U. S. C. A. Section 526 which authorizes the filing of a Petition for Reorganization by "three or more creditors" was satisfied.

3. Whether a timely appeal was perfected from the injunctive order of the District Court.

STATUTE INVOLVED.

The statutes involved are adequately set forth in the Petition.

STATEMENT.

Rex Schepp and Benjamin F. Shepp, stockholders in Evansville Television, Inc., seek by their Petition for Certiorari to obtain review by this Court of an order of the District Court, approved by the Court of Appeals, in a Chapter X Bankruptcy Reorganization proceeding, 11 U. S. C. A. Section 501 *et seq.*; which approved and declared filed in good faith a Petition to Reorganize the subject corporation.

The Petitioners, as objecting stockholders, also seek review by this Court of the ruling of the Court of Appeals that certain notices of appeal of an order of injunction and an order of allowance were not timely.

The Petition for Reorganization of the subject corporation, under Chapter X, was filed in the District Court by the three Respondents herein. There were three intervening creditors which petitioned to join, and were permitted to join, as Petitioning Creditors seeking reorganization. Affidavits were filed by Petitioning Creditors to conform

with Bankruptcy General Order 5(2). Two of these affidavits are questioned by the Petitioners herein as to their accuracy. The corporation filed an answer consenting to its reorganization. The Petitioners herein, as objecting stockholders, filed a controverting answer to the Petition. After the appointment of a Trustee the District Court granted an injunction enjoining shareholders from holding stockholders' meetings. The District Court, after hearing evidence, approved the Petition for Reorganization and made findings of fact including findings that the debtor corporation was insolvent (R. Ap. I, p. 83) (appendix references herein conform with those used in the Petition for Certiorari), that the reorganization petition was filed in good faith (R. Ap. I, p. 84), that neither the debtor nor its directors, stockholders, attorneys, agents, officers or employees at any time committed "any wrong or fraudulent acts" (R. Ap. I, p. 84), that the Petitioning Creditors constituted three separate legal entities (R. Ap. I, p. 81), and that the intervening creditors were separate and distinct and, as Petitioning Creditors, constituted three creditors (R. Ap. I, p. 81). These findings, together with other questions, were appealed by the Petitioners to the Court of Appeals for the Seventh Circuit and were there upheld (pp. 40, 41, Petition for Certiorari). The injunction against the holding of further stockholders' meeting was also appealed, and that appeal was dismissed by the Court of Appeals on the ground that it was not timely filed (Opinion, Petition for Certiorari, p. 28).

ARGUMENT.

I.

There Is No Conflict of Decision.

The objecting stockholders, in their Petition for Certiorari, assert that the holdings of the Court of Appeals and the District Court are in conflict with certain United States Supreme Court cases. It is their argument that the consenting answer of the debtor, and the fact that certain directors of the debtor had an interest in the creditor corporations, prevented the proceeding herein from being in good faith. The cases they rely on, to establish the conflict, are clearly distinguishable and there is not even a conflict of principle. These cases are:

(1) *Pepper* v. *Litton*, 308 U. S. 295 (1939). In *Pepper* one of the directors of the debtor corporation milked the debtor of assets to pay "what was not an honest debt of the corporation", 308 U. S. 295, 301, in what was a "planned and fraudulent scheme". 308 U. S. 295, 312. This case does not condemn dealings by directors with their corporations. It merely says that such dealings must be fair and in good faith.

(2) *Geddes* v. *Anaconda Copper*, 254 U. S. 590 (1920). Here a corporate director sold assets of his corporation to another of his corporations at what both the District Court and the Court of Appeals found to be an inadequate price, and in the opinion in the *Geddes* case there is no restriction on dealings between corporations with boards having common members. There is merely a requirement that such dealings be fairly conducted.

(3) *Harkin* v. *Brundage*, 276 U. S. 36 (1927). In this case there was overt fraud in the concealment of a pending state court receivership from the Federal District Court, and, moreover, this was not a bankruptcy case. It was an equity receivership and the question was whether the Federal or State court should have jurisdiction of the receivership *res*.

These cases merely announce the well-known principles that Fraud is Wrong (*Harkin* v. *Brundage*) and that directors should deal fairly and in good faith with their corporations (*Pepper* v. *Litton* and *Geddes* v. *Anaconda*). None of them is in conflict with the concurrent findings herein that the directors of the debtor acted fairly and in good faith and without fraud. Indeed, unless this Court finds error in the concurrent finding of good faith herein (discussed *infra* at pages 6-10) there is absolute harmony between the instant case and the cases characterized by the objecting stockholders as conflicting.

II.

There Is No Important Question of Federal Law.

The objecting stockholders have, in their Petition for Certiorari, asserted that certain questions are important questions of Federal law which have not been, but which should be, settled by this Court. Nowhere in the Petition is there any reason given to support the conclusion that the questions are important. These questions, deemed important in the Petition, turn more or less on the unique facts of this case; *e.g.*, the question of the import of the two affidavits, urged as "important" on page 17 of the Petition, turns on the meanings of the phrase "personal knowledge" and the word "paid" and their significance in affidavits under Bankruptcy General Order 5(2). (See

discussion at pages 6-8, *infra* herein.) It is submitted that this question and the other questions characterized as "important" in the Petition are important to but few other than the parties herein and do not warrant certiorari review by this Court.

III.

The Decision Below Is Clearly Correct.

The Petitioners for Certiorari herein have argued that this Court should review the holding of the Court of Appeals because that Court committed error in upholding the District Court's findings of fact that (1) The reorganization petition was filed in good faith, and (2) there was the required minimum of three creditors; and they further urge that the Court committed error in dismissing the injunctive order because its appeal was not timely.

The Reorganization Petition was filed in good faith. It is, of course, "well established that this court will not disturb findings of fact made by a district court in equity concurred in by the circuit court of appeals, except in case of clearest error (citing 10 U. S. Supreme Court cases)", *Charleston, S. C. Mining & Mfg. Co.* v. *U. S.*, 273 U. S. 220, 223 (1927). It is equally well established that District Courts sitting on bankruptcy matters are courts of equity. *Pepper* v. *Litton*, 308 U. S. 295, 308 (1939). The conclusion of good faith was a finding of fact (R. Ap. I. p. 84). Thus, the standard to be applied to the "good faith" question is whether the Court of Appeals committed the clearest error.

In attempting to show the error of the Court of Appeals the Petitioners have stressed that the filing of certain affidavits by the Petitioning Creditors constituted bad faith. Bankruptcy General Order 5(2) requires an affidavit stating that claims were not obtained for the purpose of

filing the Reorganization Petition. One Denis Stallings executed such an affidavit as an officer of Producers, Inc., one of the Petitioning Creditors. It is not argued in the Petition for Certiorari, nor is it a fact, that Producers, Inc. obtained its claim for the purpose of filing the reorganization petition. Rather, the substance of the argument of the Petitioners is merely that Stallings' affidavit stated that it was executed on personal knowledge, and that the affiant did not have personal knowledge of the facts sworn to, although such facts are admittedly true. The affiant, as Vice-President of Producers, Inc., had knowledge based on information from the attorneys and accountant of the Petitioning Creditors, including Producers, Inc., and these sources had intimate knowledge of the information contained in the affidavit. It is submitted that a corporate officer obtaining such information from such sources could reasonably consider such knowledge to be "personally known" to him. Moreover, G. O. 5(2) affidavits are not required to be on personal knowledge. But it is not the purpose of Respondents to argue the importance of the fact that the affiant had personal knowledge. The significant point here is that even assuming *arguendo* that he did not have personal knowledge, as a technical legal or semantic matter, his mistake is not such as to taint this entire reorganization proceeding as being filed in bad faith.

The Petitioners for Certiorari seek to defeat this proceeding on grounds of bad faith as to another technical objection to another G. O. 5(2) affidavit, the affiant in which was one Ferris E. Traylor. The affiant swore that one of the Petitioning Creditors, a corporation, "paid" $300,000.00 for an account, and the Petitioners cry fraud and perjury because the word "paid" referred to a book credit and not to an exchange of cash. It is, of course, fundamental law that an obligation may be "paid" or

satisfied by a promise of payment or other thing of value as well as by cash. *Smith* v. *Truehart*, N. Y. Supreme Court, 223 N. Y. S. 481, 483 (1927); *State* v. *Lorain*, 22 Ohio Dec. 392, 393, 12 Ohio N. P. N. S. 636. Once more, the Petitioners attempt to balance a charge of bad faith as to the entire proceeding upon an assertion that a G. O. 5(2) affidavit contains a false statement when the truth or falsity of the affidavit itself is a matter for legal and semantic disputation.

In still another attempt to impute bad faith to the filing of the Reorganization Petition, the Petitioners herein argue that there was a collusive purpose for instituting the reorganization proceedings, but there is a serious lacuna in the Petition for Certiorari in that there is a studied avoidance of the financial plight of the debtor corporation at the time of the institution of the reorganization proceedings. In fact, the ability of the debtor to obtain funds by capital contributions or loans had been exhausted (R. Ap. II, p. 14). For two years prior to the filing of the Petition banks and individuals had been approached for loans unsuccessfully (R. Ap. II, pp. 14, 53). If the debt and the capital structure of the debtor were not revised, necessary funds would be unavailable (R. Ap. II, p. 14). The debtor never had an annual period in which it experienced a profit (R. Ap. II, p. 68). The reorganization was instituted December 19, 1958. Up to and including December 22, 1958, the debtor had sustained an operating deficit of $659,383.78 (R. Ap. II, p. 107), and on that date the books of the debtor reflected total assets of $752,320.37, of which $110,790.34 were current assets (R. Ap. II, p. 105), and total liabilities of $911,204.15 of which $632,798.08 were current liabilities (R. Ap. II, p. 106). On the basis of these facts, it seems almost self-evident that a readjustment of the holdings of creditors and stockholders was required if the debtor was to continue as an operating business. On the basis of this, and

related evidence, the District Court found, and the Court of Appeals upheld, that the debtor was insolvent and the Reorganization Petition was filed in good faith.

The Petitioners for Certiorari have told this Court that there was coercion to force the Petitioners as majority stockholders to sell their holdings, that the threat of filing this reorganization proceeding was a part of that coercion; and therefore, they argue, the Reorganization Petition was filed in bad faith. There were negotiations for the purchase of stock, but the Petitioning Creditors certainly should not be chastened for attempting to save the debtor corporation from financial destruction by means other than a potentially costly reorganization proceeding. Also, the reorganization proceeding was not filed until the possible filing had been disclosed to the Petitioners. This they characterized in their Petition as using the proceeding as a club to coerce them. In their concern for what they claim to be persecution, the objecting stockholders willingly ignore the financial status of the debtor.

Also, the objecting stockholders argue that the consenting answer, filed in the reorganization by the debtor corporation, was an act of bad faith. They base this on the ground that certain directors of the debtor who voted for such consenting answer were interested in corporations having claims against the debtor. In Indiana, in accordance with the general rule, dealings between directors and their corporations are not forbidden, and are not even voidable, in the absence of a clear showing of unfairness or fraud. *Wainwright* v. *P. F. & H. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8. In the instant case there was no fraud, unfairness, or concealment, and, as recognized by the Court of Appeals, there were ample *bona fide* reasons for the debtor's consenting answer in the reorganization (Opinion, in Petition for Certiorari at page 34). Moreover, there was an express finding of fact in the District Court that none of the

directors of the debtor had committed any wrong or fraudulent acts (R. Ap. I, p. 84).

Failure to hear controverting answer was not error. The objecting stockholders have represented to this Court in their Petition that there was error by the District Court in failing to hear the controverting answer of objecting stockholders before entering an order approving the Reorganization Petition. It is not necessary to argue law on this point because the objecting stockholders have misstated the facts.

As a matter of fact, at the hearing of December 31, 1958, one of the objecting stockholders, B. F. Shepp, appeared by attorney and the other, Rex Schepp, appeared *pro se*, and Rex Schepp and that attorney, George Barnett, on behalf of B. F. Shepp, expressly agreed to the entry of "whatever order" the Court proposed to enter with relation to "the good faith and appointment of a Trustee" providing it was with the understanding that Rex Schepp had a right to be heard on his controverting answer at a later date (R. Ap. II, p. 15).

The statutory requirement of a minimum of three creditors was satisfied. There were three original Petitioning Creditors. The objecting stockholders, before the approval of the Petition for Reorganization, argued that the Petitioning Creditors could not be counted as three because they were corporations having interlocking ownership and directorate structures. Thereafter, three additional creditors petitioned to intervene, and, because of this objection, they were permitted to intervene as intervening petitioning creditors.

The objecting stockholders contend that these intervenors may not be included in computing the number of Petitioning Creditors. The law is clearly to the contrary. *Collier on Bankruptcy* states:

"This is not to say that a creditor may not be permitted to intervene in support of an involuntary petition for reorganization (f. n. citing cases). Section 207 allows intervention by a properly qualified creditor (f. n.) in the discretion of the judge upon cause shown (f. n. 7). If intervention is authorized for the purpose of joining in the petition, the intervening creditor is a petitioning creditor for all purposes, and must be counted in determining whether or not the necessary three petitioners exist (f. n.)" 6 *Collier on Bankruptcy* (14th ed.) 1424-5.

Again dealing with the factual situation at hand in this case, *Collier*, as Footnote 7 supplementing the passage just quoted, continues:

"Where a reorganization petition has been filed by only three creditors, one of which is not properly qualified under Section 126, * * * so that a dismissal is necessitated, and another creditor who is properly qualified seeks to intervene in support of the petition, it would be an unusual case in which a refusal of such intervention would not constitute an abuse of discretion." 6 *Collier on Bankruptcy* (14th ed.) 1425.

It should be noted that the Second Circuit case on which the objecting stockholders rely in this regard, *Rudnick* v. *Coney Island Boardwalk Corp.*, 181 F. (2d) 775 (C. A. 2d, 1950) did not hold, as they urge, that creditors and stockholders may not intervene. The case does hold that the court will not recognize the intervention of an attorney on behalf of creditors, where there is no reason or cause for the intervention, in setting the amount of allowance for his attorney's fee.

U. S., ex rel. Texas Portland Cement Company v. *McCord*, 233 U. S. 157 (1914), relied on by the objecting stockholders, is wholly inapplicable because: (1) the petition to interevene in that case was not timely filed, being more than a year after the commencement of the action; (2) the case

involved a Federal Act concerning suppliers of work and labor to the government and the decision turns on specific statutory language; (3) no bankruptcy or Chapter X proceeding was involved; and (4) the Court held that the purported intervention was not an intervention at all, but merely an appearance in the original action.

It is not admitted by the Respondents that this proceeding would lack three Petitioning Creditors if the intervenors were not counted as Petitioning Creditors. The argument that the three corporations constituting the original Petitioning Creditors should be considered as only one creditor because of their similar (not identical) shareholders and officers is unconvincing in light of the leading case of *Watertown Paper Company*, 169 Fed. 252, 255-6 (C. C. A. 2d, 1909), which establishes the separate existence of corporations in bankruptcy matters where stockholders are largely the same and the same management exists.

The Court of Appeals did not commit error in refusing to review the injunctive order issued by the District Court. The Court of Appeals refused to review the order of the District Court enjoining shareholders' meetings because the appeal was not timely filed. In so doing it relied on well-established precedent (see Opinion, Petition for Certiorari, pp. 37-38). However, it is not necessary to discuss here the timeliness of the appeal. In the first place there was not error in the District Court in granting the injunction because it was within the broad discretion of that court. *South State Street Bldg. Corp.*, 140 F. (2d) 363, 366 (C. C. A. 7th, 1943); *Public Service Holding Corp.*, 141 F. (2d) 425 (C. C. A. 2d, 1944).

Perhaps even more significant is the fact that the objecting shareholders did, contrary to the command of the injunction, hold a meeting which they characterized as a stockholders' meeting (R. Ap. I, p. 61, and R. Ap. II, pp.

72, 73), and thus the question of error is moot because the objecting stockholders were not prejudiced.

The question of timeliness of appeal of allowances was correctly decided by the Court of Appeals. The objecting stockholders argue that the Court of Appeals erred in holding that the appeal of allowances was not timely. It is obvious that this question is moot unless Certiorari is granted on other grounds, as is admitted by implication on page 14 of the Petition for Certiorari. However, it is submitted that the same authorities relied on by the Court of Appeals in dismissing the appeal of the injunctive order as untimely (Opinion, pp. 37, 38, Petition for Certiorari) are equally applicable here.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

No. 814

BRIEF IN OPPOSITION FOR THE RESPONDENTS CARL OLF SMITH AND BUTTERFIELD INC AND RED SPOT PAINT AND VARNISH COMPANY INC

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 814.

REX SCHEPP, AND BENJAMIN F. SHEPP,
Petitioners,

vs.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION FOR THE RESPONDENTS CARL WOLF, SMITH AND BUTTERFIELD, INC., AND RED SPOT PAINT AND VARNISH COMPANY, INC.

OPINIONS BELOW.

The opinion of the District Court was not reported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 286 F. 2d 65 (1961).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether or not the claims of three intervening creditors should be counted in determining the existence of the three creditors required by § 126 of the Bankruptcy Act (11 U. S. C. § 526).

STATUTE INVOLVED.

Section 207 of the Bankruptcy Act (11 U. S. C. § 607) provides:

> "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter."

STATEMENT.

This brief in opposition is filed by Carl Wolf, Smith and Butterfield, Inc., and Red Spot Paint and Varnish Company, Inc., three intervening creditors. It deals only with those issues raised by the petitioners which directly relate to the intervening creditors. This proceeding was commenced December 19, 1958, as an involuntary petition for reorganization under Chapter X of the Bankruptcy Act (11 U. S. C. § 501). Thereafter, Carl Wolf, Smith and Butterfield, Inc., and Red Spot Paint and Varnish Company, Inc., filed their petition to intervene as additional petitioning creditors. On April 2, 1959, the District Court granted that petition. Following protracted hearings, the District Court specially found that the intervening petitioning creditors were creditors of the debtor, having claims against it, liquidated as to amount and not contingent as to liability, amounting in excess of $5000.00 (R. Ap. I, 81). The District Court further specifically found that the reorganization petition was filed in good faith (R. Ap. I, 84).

ARGUMENT.

The petitioners would have this Court take jurisdiction to reverse findings of fact of the District Court affirmed by the Court of Appeals, which held that there were three separate creditors and that the proceeding was filed in good faith. This Court has repeatedly held that it will not review conflicting evidence, but will take the findings of the trial court as being correct, unless palpably erroneous. *National Labor Relations Board* v. *American National Ins. Co.* (1952), 343 U. S. 395, 410.

In the case above cited, the Court held:

> "We stated that this Court is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. * * * We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case."

In the case at bar there were six petitioning creditors, and the District Court found that all six of these petitioning creditors had claims against the debtor, liquidated as to amount and not contingent as to liability, amounting in the aggregate to $413,507.51. No question has been raised by the petitioners as to the good faith of the three intervening creditors, who had separate claims and who complied with the jurisdictional requisites.

Thus, petitioners are left with an argument that lack of good faith is conclusively demonstrated by reason of alleged defective affidavits. As to the affidavit of Dennis Stallings, the petitioners say affiant did not have *personal* knowledge of the contents of the affidavit. No issue is raised that the contents were not correct or completely

true, but only that the affiant did not *personally* know they were true. Surely, such sophistry can not prevail.

The other affidavit which petitioners attack is the affidavit of Ferris Traylor, wherein he states that one of the petitioning creditors, a corporation, "paid" $300,000 for an account. The evidence showed that such payment was by way of book credits and debits and there was not an exchange of cash. Of course, it is clear from the cases that "cash" is only one of the forms of payment and an obligation may be "paid" in many ways other than cash, such as by check, by off-setting accounts, by work or labor, by merchandise, or by any other item of value. Here again, petitioners predicate lack of good faith, not on the reality as shown by the evidence, but upon pure technicality and petitioners' erroneous definition of the word "paid." In any event, the District Court found, as a fact, against the petitioners, which finding was substantiated by the evidence; and this finding of fact was affirmed by the Court of Appeals. Surely, such an illusory, academic question presents no important federal question; and the rulings of the courts below are not in conflict with any decisions of this Court or any other court of appeals.

Petitioners raise the question as to whether or not the claims of the intervening petitioning creditors should be counted in determining whether or not the jurisdictional requisites of the three petitioning creditors are met. Section 207 of the Bankruptcy Act (11 U. S. C. § 607), which deals with Chapter X proceedings, provides:

> "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter."

On this point, the Court of Appeals below held:

> "Such intervention is authorized under 11 U. S. C. A. § 607. *Seaboard Terminals Corp.* v. *Western Mary-*

land Ry. Co., 4 Cir., 108 F. 2d 911, 914; and see dictum in *In Re Federal Facilities Realty Trust*, 7 Cir., 220 F. 2d 495, 500-501. We do not agree with appellants that 11 U. S. C. A. § 596 limits § 607 so as to authorize intervention only after approval of the petition. And where a creditor has been properly permitted to intervene he is to be counted in determining the existence of the requisite number of creditors. Cf. *Syracuse Engineering Co.* v. *Haight*, 2 Cir., 110 F. 2d 468; 6 Collier on Bankruptcy (14th ed.) 1424-5."

The right of intervention in this situation has never been challenged. In the case cited by petitioners, *In Re Flour Mills of America, Inc.* (D. C. Mo. 1939), 27 F. Supp. 559, 561, no cause was shown for intervention and intervention was, therefore, properly denied. Here, there is no question but what due cause is shown for intervention; and the intervention was properly granted.

Petitioners also cite *In Re Associated Gas & Electric Co.* (D. C. N. Y. 1936), 14 F. Supp. 582, 583, 584. This case in no way dealt with § 207 under Chapter X of the Bankruptcy Act, but held solely that the intervention provisions of § 77 B of the Bankruptcy Act prevail over the provisions of § 59(f). Further, no cause was shown for intervention. A full answer on this point, however, is that the petitioning creditors do not rely upon § 59(f), but rely upon § 207 of the Bankruptcy Act and Rule 24 of the Federal Rules of Civil Procedure. There are, thus, no cases in conflict with the opinion of the Court of Appeals herein holding that such intervention was proper.

CONCLUSION.

The decision of the court below is clearly correct and no substantial questions meriting further review are presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents Carl Wolf, Smith and Butterfield, Inc., and Red Spot Paint and Varnish Company, Inc.

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Supreme Court of the United States

No. 74

BRIEF OF DOUGLAS H. MACDONALD, TRUSTEE
RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1960

No. 814

REX SCHEPP and BENJAMIN F. SHEPP,
Petitioners,

v.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF DOUGLAS H. McDONALD, TRUSTEE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and judgment of the District Court are not officially reported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 286 F(2d) 65 (1961).

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1961. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 11 U.S.C. 47(c), 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

Douglas H. McDonald, individually, included in the caption above, was not a party to any of the proceedings in the courts below. He was not served with copy of petitioners' brief herein in accordance with Rule 33 of the Rules of the Supreme Court, nor was any brief served on any attorney authorized to represent him. Hence, this Court has no jurisdiction of said Douglas H. McDonald, individually.

QUESTIONS PRESENTED

The following questions concerning the respondent, Douglas H. McDonald, Trustee, are presented in the petition for certiorari:

A. Whether, in a proceeding under Chapter X of the Bankruptcy Act, orders allowing compensation to the Trustee and counsel over the objections of stockholders are orders which must be appealed within the time allowed by Section 25 of the Bankruptcy Act (11 U.S.C. Sec. 48)?

B. Whether, in a proceeding for corporate reorganization under Chapter X of the Bankruptcy Act, a temporary injunction entered against answering stockholders is an order which must be appealed within the time allowed by Section 25 of the Bankruptcy Act (11 U.S.C. Sec. 48)?

STATUTES INVOLVED

Respondent Trustee accepts petitioners' citation of statutes involving the questions presented. Section 24 of the

Bankruptcy Act (11 U.S.C. Sec. 47) is also pertinent to the questions presented.

STATEMENT OF THE CASE

On December 19, 1958, a creditors' petition for the reorganization of Evansville Television, Inc. was filed. On December 22, 1958, a Receiver was appointed.

On January 2, 1959, the District Judge appointed Douglas H. McDonald as trustee of debtor corporation.

On January 30, 1959, one of the petitioners, Rex Schepp, a stockholder, filed a petition before the District Judge for permission to use debtor's office for holding a special meeting of stockholders in lieu of the annual meeting.

On February 3, 1959, the trustee filed his objections to said petition of petitioner, Rex Schepp.

On February 5, 1959, the trustee filed amended objections to the petition of petitioner Rex Schepp for permission to use debtor's office for holding a meeting of stockholders.

On February 10, 1959, the District Judge entered an order providing inter alia, "that the petition of Rex Schepp for permission to use debtor's office for holding annual meeting be, and the same is hereby denied and the Trustee's objections and amended objections thereto be and the same are hereby sustained and it is further ordered by the court that no meeting of the stockholders be called or conducted for the purpose of electing new directors either at the annual or special meeting of the stockholders of the debtor corporation, until the further order of the Court."

On May 22, 1959, October 15, 1959 and November 17, 1959, the District Judge entered separate orders, subsequent to

hearings, allowing fees and expenses to the trustee, counsel for the trustee, and the accountant for the trustee.

On February 12, 1960, the District Judge entered an order approving the petition for reorganization.

On February 23, 1960, petitioners filed notice of appeal in the District Court to the order of February 12, 1960, approving the petition for reorganization, to the injunction order of February 10, 1959, and to the orders of May 22, October 15 and November 17, 1959, respecting the allowance of compensation to the trustee, his counsel, and his accountants.

On August 11, 1960, the trustee filed in the United States Court of Appeals for the Seventh Circuit his motion to dismiss those portions of the appeal pertaining to the grant of allowances for the reasons that:

A. The notice of appeal was untimely,

B. That petitioners failed to obtain leave of court to appeal.

On September 16, 1960, the United States Court of Appeals for the Seventh Circuit dismissed said purported appeal from the orders of the District Judge dated May 22, 1959, October 15, 1959, and November 17, 1959, as untimely. (Appendices A and B).

On January 5, 1961, the United States Court of Appeals for the Seventh Circuit, in its opinion (Appendix A, pp. 37, 38 of petitioners' brief) also dismissed as untimely the injunctive order of February 10, 1959. The court below also affirmed the District Court's order of February 12, 1960, approving the petition for reorganization under Chapter X.

ARGUMENT

The Respondent Trustee's argument is directed only to the questions set forth above. With respect to those questions, it is submitted that it is abundantly clear that the decisions below by the United States Court of Appeals for the Seventh Circuit are correct, are not in conflict with any other decisions, and are well supported by the pertinent statutes and by the decisions of this court.

I.

Allowances Issue

As noted above, the District Court entered separate orders respecting allowances of compensation to the trustee, his counsel and his accountant, on May 22, 1959, October 15, 1959, and November 17, 1959, respectively. It was not until February 23, 1960, that petitioners herein filed a notice of appeal with the District Court with respect to these orders. The petitioners herein have never filed a petition for leave to file an appeal with the Court of Appeals from said orders.

Generally speaking, an appeal must be made from any order within the allotted time after the order becomes appealable or the right to appeal is waived. *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U.S. 579, 44 A.B.R.(N.S.) 414, 61 S.Ct. 331, 85 L.Ed. 364 (1941). *In re Country Club Bldg. Corporation*, 49 A.B.R.(N.S.) 353, 128 F.2d 36 (7th Cir. 1942). In proceedings under Chapter X of the Bankruptcy Act, there is a special provision rendering orders making or refusing to make allowances of compensation appealable when entered. Section 250 of the Bankruptcy Act (11 U.S.C. Sec. 650) provides as follows:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this act, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

The time within which such appeals must be filed is set forth in Section 25 of the Bankruptcy Act (11 U.S.C. Sec. 48) which provides as follows:

> "a Appeals under this act to the United States Court of Appeals shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.
>
> "b Receivers and trustees shall not be required in any case to give bond when they take appeals."

In the case at bar the notice of appeal to the allowance orders of May 22, October 15 and November 17, 1959, was not filed with the District Court until February 23, 1960. It was clearly beyond the time allowed by the above statute and was, therefore, properly dismissed. (Appendix B).

Petitioners claim that the provisions of Sec. 250 of the Act should not be strictly applied. Petitioners contend that the orders were not appealable because the petition for reorganization had not been approved at the time the orders were entered. The statute, however, sets forth no such exception to its application, nor do the petitioners cite any authorities which support their contention.

Petitioners in their brief do cite the case of *A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co.*, 95 F.2d 703 (8th Cir. 1938). This case is not a bankruptcy case, does not involve Sec. 250 of the Bankruptcy Act, nor does it involve any other provision of the Act.

The *A. & R. Realty Co.* case cited above involves the foreclosure by a creditor of a deed of trust. After suit was filed, a receiver was appointed. Later an order of foreclosure was entered. On appeal from the order of foreclosure, the question arose as to whether the order appointing the Receiver was also reviewable. The court said that it was, and then affirmed the order. The court did not, of course, consider whether the failure to appeal from an order making an allowance of compensation in a proceeding under Chapter X of the Bankruptcy Act constitutes a waiver of the appeal, for this question was not before the court.

The case of *In re Country Club Bldg. Corporation*, 49 A.B.R. (N.S.) 353, 128 F.2d 36 (7th Cir. 1942), did, on the other hand, deal with the application of Sec. 250 of the Bankruptcy Act. In that case, orders were entered on September 22, 1951 and October 3, 1941, awarding judgment against the appellant and in favor of the appellee as reimbursement for compensation awarded a special master and paid by the appellee in a reorganization proceeding. No notice of appeal was filed with the District Court until December 5, 1941, more than 30 days subsequent to the entry of the order appealed from. The appellant failed to seek permission from the Court of Appeals to prosecute the appeal. The court in finding that it was without jurisdiction for both of these reasons, commented as follows:

> "... Sec. 250 of the Chandler Act, 11 U.S.C.A. Sec. 650, provides the method of taking an appeal from 'orders making or refusing to make allowances of compensa-

> tion or reimbursement' and that such appeal may be 'taken to and allowed by the Circuit Court of Appeals.' That this provision, where applicable, must be complied with in order to confer jurisdiction, has been decisively adjudicated. Dickinson Industrial Site v. Cowan, 309 U.S. 382, 60 S.Ct. 595, 84 L.Ed. 819; R.F.C. v. Prudence Securities Advisory Group, 311 U.S. 579, 61 S.Ct. 331, 85 L.Ed. 364. Appellee also relies upon Sec. 25 Sub. a of the Chandler Act, 11 U.S.C.A. 48 Sub. a, which requires the taking of an appeal within 30 days after the entry of the order or decree complained of. That this requirement, if applicable, is also jurisdictional, cannot be doubted. In re Interstate Oil Corp., 9 Cir., 63 F.2d 674; In re Fox West Coast Theaters, 9 Cir., 88 F.2d 212, 221; Shreiner, et al. v. Farmers' Trust Company of Lancaster, 3 Cir., 91 F.2d 606, 607."

It is clear in the light of the above case that the time limitation of Sec. 25 of the Bankruptcy Act is jurisdictional. This court has so indicated in *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U.S. 579, *supra*.

It is submitted, therefore, that the decision of the court below dismissing the appeal of the petitioners with respect to the orders making allowances of compensation on the grounds that the appeal was untimely was entirely correct.

Although the Court of Appeals below did not comment on the method by which petitioners sought appellate review of the orders in question, it is clear that petitioners' appeal was defective for an additional reason. Since the decision of *Dickinson Industrial Site, Inc. v. Cowan, et al.*, 309 U.S. 382, 60 S.Ct. 595, 84 L.Ed. 819 (1940), it has been well settled that appeals under Sec. 250 cannot be taken as of right but may only be taken upon the allowance thereof by the Court of Appeals in its discretion. This Court said in the *Dickinson* case, at page 385 of the U.S. Report:

> "Our view, however, is that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Chap. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals."

The petitioners have never filed a petition for permission to appeal with the Court of Appeals for the Seventh Circuit. *Cohen v. Casey*, 152 F(2d) 610 (1st Cir. 1945).

Moreover, the petition for writ of certiorari as it applies to the trustee is untimely. The court below dismissed the appeal from allowances on September 13, 1960. Petitioners should have filed their petition for a writ of certiorari on the question of allowances on or before December 13, 1960, pursuant to 28 U.S.C. 2101(c). The petition for writ of certiorari was filed on March 16, 1961.

II.

Injunction Issue

On February 10, 1959, the District Court entered an order restraining the calling or conducting of a meeting of stockholders for the purpose of electing directors until further notice. The notice of appeal from this order was not filed until February 23, 1960, more than one year later.

This appeal is governed by the provisions of Sections 24 and 25 of the Bankruptcy Act (11 U.S.C. Sec. 47 and 11 U.S.C. Sec. 48). Section 24 provides in pertinent part:

> "a The United States Courts of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in

controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matter of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

See section 25 as set forth at page 6 of this brief.

The court below held that the appeal of the District Court's injunctive order in this case was a "proceedings in bankruptcy" order distinguishing it from "controversies arising in bankruptcy." The court based this holding on *Albin v. Cowing Pressure Relieving Joint Co.* 317 U.S. 211, 63 S.Ct. 170, 87 L.Ed. 212 (1942), in which the court said at page 212 of the U.S. Report:

"Section 24(a) of the Chandler Act ([June 22, 1938] 52 Stat. at L 840,854, chap 575, 11 USCA § 47) gives the Circuit Courts of Appeals appellate jurisdiction from courts of bankruptcy 'in proceedings in bankruptcy, either interlocutory or final.' An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a proceeding in bankruptcy. See Harrison Securities Co. v. Spinks Realty Co. (CCA 9th) 92 F (2d) 904, 35 Am Bankr Rep (NS) 288; Taylor v. Voss, 271 US 176, 181, 70 L Ed. 889, 892, 46 S. Ct. 461, 7 Am Bankr Rep (NS) 706. The amendments to § 24(a) made by the Chandler Act practically abolished the distinction between appeals as of right and by leave. S. Rep. No. 1916, 75th Cong. 3d Sess. p 4. And see Dickinson Industrial Site v. Cowan, 309 US 382, 385.

388, 84 L Ed. 819, 823-825, 60 S. Ct. 595, 42 Am Bankr Rep (NS) 209. . . ."

The court below further held that since interlocutory orders in "proceedings in bankruptcy" are appealable, the injunctive order of the District Court should have been appealed within the time allotted for appeals by Sec. 25 of the Bankruptcy Act (11 U.S.C. 48). The maximum time under said section is forty days from the entry of the order. Petitioners took no steps to perfect an appeal of the injunctive order in this case for more than one year.

The conclusion of the court below that petitioners were not entitled to an appeal from the injunctive order because it was untimely was obviously correct.

CONCLUSION

It is respectfully submitted that the court below ruled correctly in dismissing the appeal from the allowance orders of May 22, October 15 and November 17, 1959, and the injunctive order of February 10, 1959, on the grounds that the appeals from said orders were untimely. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

IN THE MATTER OF EVANSVILLE TELEVISION, INC., DEBTOR, REX SCHEPP and BENJAMIN F. SHEPP, *Appellants.* v. PRODUCERS, INC., et al., *Appellees.*	Cause No. 13024

MOTION TO DISMISS APPEAL

The appellee, Douglas H. McDonald, trustee of Evansville Television, Inc., debtor, moves to dismiss the appeal herein by Rex Schepp and Benjamin F. Shepp from the orders authorizing and directing the payment of compensation to the trustee, and to counsel for the said trustee, for the following reasons:

1- The notice of appeal is untimely; and

2- The appellants have failed to obtain leave of court to appeal.

s/John K. Rickles

JOHN K. RICKLES,
Attorney for
DOUGLAS H. McDONALD,
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Of Counsel.

APPENDIX B

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

September 13, 1960.

Before

HONORABLE F. RYAN DUFFY, *Circuit Judge*
HONORABLE WIN G. KNOCH, *Circuit Judge*
HONORABLE LATHAM CASTLE, *Circuit Judge*

In the Matter of Evansville Television, Inc., Debtor. REX SCHEPP and BENJAMIN F. SHEPP, *Appellants.* v. PRODUCERS, INC., et al., *Appellees.*	No. 13024

Appellee, Douglas H. McDonald, Trustee of Debtor, having moved to dismiss the appeal by Rex Schepp and Benjamin F. Shepp from orders of the Court dated May 22, 1959, October 15, 1959 and November 17, 1959, which allowed fees and expenses to the Trustee, to Counsel for the Trustee, and for the Accountant for the Trustee, respectively, said notice of appeal being filed February 23,

1960; and it appearing that said notice of appeal also appealed from the order of the District Court dated February 12, 1960, approving the petition for reorganization;

IT IS ORDERED that the purported appeal from the orders dated May 22, 1959, October 15, 1959 and November 17, 1959 were not timely, and the motion to dismiss the appeal as to said orders should be granted;

IT IS FURTHER ORDERED that the appeal from said orders of May 22, 1959, October 15, 1959 and November 17, 1959 be and the same is hereby dismissed.

Supreme Court of the United States

No. 814

PETITIONERS REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

NO. 814.

REX SCHEPP AND BENJAMIN F. SHEPP,
Petitioners,

vs.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

I.

The assertion of respondent petitioning creditors (Brief p. 10) that Rex Schepp and Benjamin F. Shepp (petitioners here) consented to a finding of good faith, and an order appointing a trustee, before hearing on the controverting answer, is itself a manifestation of the lack of good faith

which has characterized the prosecution of this reorganization.

We suggest that examination of the record will disclose who has "misstated the facts."

On December 31, 1958, the day after filing his controverting answer, Rex Schepp (who is not a lawyer) appeared *pro se* at the hearing set on the petition and debtor's answer. B. F. Shepp did not appear and Mr. Barnett, his lawyer, was not there "on any official status," and obviously did not appear for him. The colloquy between Mr. Gesas (for petitioning creditors), the Court and Rex Schepp, at the conclusion of this hearing, was as follows:

> "Mr. Gesas: Your Honor, I might say to you I have talked to Mr. Barnett, who is not here on any official status. He advises me that Mr. Schepp is agreeable at this time that whatever order the Court proposes to enter, that it be entered in relation to the good faith and appointment of a Trustee, and with the understanding and the law provides without any understanding the understanding he has a right on his controverted answer to be heard within what period of time the Court can properly hear him. Is that correct, Mr. Schepp?
>
> Mr. Schepp: That is correct. * * *" (R. Ap. II, 15)

Did Rex Schepp intend by this to withdraw the controverting answer, to concede "good faith" and to consent that the corporate assets should be vested in a trustee? Did he agree that the recreant directors' unlawful consent should stand, and the debtor should be permanently disabled from defending against the conspiratorial attack which was alleged in the controverting answer? Or did counsel with the Court's approval seek to make a consent appear where none existed?

Consent that an order be entered "in relation to the good faith and the appointment of a trustee" certainly was

not consent that good faith should be confirmed and a trustee appointed. The order which Schepp had a right to expect "in relation to" these matters was an order continuing the status quo until the challenged good faith (and other challenged prerequisites) could be established *after* hearing the stockholders' answer, and *refusing* to appoint a trustee until that time.

II.

The positive *mala fides* evidenced by the false affidavits of Denis Stallings and Ferris Traylor is not "technical." It may be "semantic" in the sense that the intentionally equivocal and therefore false use of the word "paid" is exposable by "semantic" analysis.

Stallings' G. O. 5(2) affidavit was attached to the petition as evidence that Producers had not acquired the notes for the purpose of instituting the proceeding, and to show "the true consideration" for the transfer. Whether or not Stallings knew the difference between hearsay and personal knowledge, counsel who procured the affidavit undoubtedly did. Counsel requested Stallings to sign the affidavit, "based upon the information we were then giving you." (R. Ap. I, 36.) We can scarcely believe that learned counsel was wholly oblivious to the basic terminology of the law of evidence.

> "The first corollary from the general principle of Knowledge is that what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses*, not from the reports of others,—in other words, must be founded on personal observation." II Wigmore Evidence, 3 Ed., Sec. 657, p. 762.

If the sufficiency of the affidavit did not depend on this positive affirmation of knowledge (respondents insist that

it did not) the offense is aggravated. What purpose in this falsity except its added effect in convincing the judge?

The assertion in both the Stallings affidavit (R. Ap. I, 11) and the Traylor affidavit (R. Ap. I, 31) that the transfer to Producers was made "in consideration of $300,000 being paid by Producers, Inc. to Traylor Bros., Inc." plainly is a wilful falsification of the *true* consideration.

It is quite true that "an obligation may be 'paid' or satisfied by a promise of payment or something other than cash". (Pet. Cred. brief, pp. 7-8.) In the Traylor to Producers to Traylor Bros. to Traylor (as outlined by Traylor) this happened. Producers' obligation to Traylor, arising from transfer of the notes, was paid by the book credit promise given Traylor Bros. Traylor Bros.' obligation to Producers arising from the book credit was *paid* by the book credit given Traylor. *But $300,000 was not paid to anyone.*

Respondents assert, in effect, that these falsifications are unimportant because, as they say, it is not a fact "that Producers, Inc. obtained its claim for the purpose of filing the reorganization petition." If this were sustained by the record it would be immaterial because wilfully falsified evidence to establish a material fact constitutes bad faith, although unnecessary.

Here circumstances conclusively indicate that Traylor did transfer the notes to Producers for the purpose of this proceeding. He first threatened receivership Nov. 12, 1958 (R. Ap. I, 59-60.) He transferred the notes to Producers Nov. 20, 1958. (R. Ap. I, 10.) At that time Traylor Bros., Industrial and Traylor himself were potential claimants. He says that he transferred the notes to Producers to "get the money to settle a personal income tax situation." (R. Ap. I, 40.) But what he got was not money but a book credit, not from Producers, but from *Traylor Bros.* (R

Ap. I, 40.) There is no evidence that he ever actually received $300,000 or any other sum to pay taxes. There is no explanation of why he did not transfer the notes directly to Traylor Bros. Even though *one* purpose may have been to obtain a $300,000 credit with Traylor Bros., the inference is irresistible that the purpose of the transfer to Producers was to keep the semblance of *three* creditors rather than two. If Traylor Bros., which (maybe) supplied the tax money, had become holder of the notes, then there would have been only *two* ostensible Traylor creditors.

Certainly it is not possible to demonstrate from the evidence the harmlessness of these false affidavits or the palpable lack of frankness and good faith in offering Traylor's unsupported and demonstrably false assertion of honest purpose.

III.

Whether or not it was for the best interests of the debtor to confess judgment in the reorganization proceeding, Traylor, Krueger, and Moser, who were personally interested in using the reorganization procedure to oust Schepp control, and only for that purpose, were not qualified to act for the corporation in making that decision. Consequently, their action in confessing the petition and representing that action as the product of lawful corporate action, thereby foreclosing a fair trial of the issue, exhibited the grossest lack of good faith.

Respondent petitioning creditors put forward the alleged "financial plight" of the debtor as complete justification for this fraudulent action. This, if true, would be no answer; but even in this attempt, respondents fail to disclose that the "balance sheet insolvency" cited on page 8 of their brief, was the result of a system of accounting installed by Traylor under which permit acquisition costs originally capitalized, had been charged to "expense," and

that the reversal of this bookkeeping would have shown a "balance sheet solvency." (R. Ap. I, 55, 56.) Even after the filing of the petition Traylor was both demanding and offering $10 per share for Equity Stock. While the stockholders' answers were still undetermined (July 1959) Traylor refused 100 cents on the dollar for his claims and $10 per share for his and other minority stock. (R. Ap. I. 102-120.) We doubt that directors not bent on achieving corporate control would have decided reorganization necessary.

Respondents suggest that "Petitioning Creditors certainly should not be chastened for attempting to save the debtor corporation from financial destruction by means other than a potentially costly reorganization proceeding." Obviously the only means "other than a potentially costly reorganization proceeding" which Traylor would countenance was to give him and his associates control and permit them to supply additional capital. Is it not possible that Schepp could have found someone else to do this if the usurping minority directors had relinquished their unlawful tenure? The debtor corporation and the Schepp minority were entitled to this. The use of the extraordinary equity powers conferred by Ch. X for the sole purpose of forcing the Schepps to sell out to Traylor is clearly unconscionable.

IV.

Without counting the intervenors, there were never as many as three qualified petitioning creditors.

(a) Producers, Industrial, and Traylor Bros. were, as "entities", subject to a single will, so that there was no concurrence of *three* separately motivated minds in the advisability of prosecuting a reorganization petition. *In re Watertown Paper Co.* (2nd C. C. A. 1909), 169 Fed. 252, does not decide that three claims under unitary control

constitute their corporate owners three creditors within the meaning of 11 U. S. C. 126. It holds that a parent corporation may claim against its wholly owned subsidiary in bankruptcy. Today it is doubtful authority for this proposition since *Taylor* v. *Standard Gas Co.* (1939), 306 U. S. 307. Under this case Traylor (with Producers, Industrial and Traylor Bros.) would have been subordinate to all other creditors of the debtor because of Traylor's control of the debtor under the expired voting trust. But the decision below permits Traylor by corporate schizogenesis (R. Ap. I, 38) not only to become *three* creditors, but to confess judgment on his own petition by virtue of his control of the debtor.

(b) Respondents, while professedly not admitting that the proceeding lacks three petitioners without counting intervenors, offer no argument to support the claim of Industrial as a separate "Entity". Even as a separate corporation, Industrial was a subcontractor under Traylor Bros. Traylor Bros. was the "entity" to whom was due the labor and material demand asserted by Industrial.

V.

Respondents' argument in support of the curative effect of the intervention of additional creditors is both unsubstantial and inconsistent.

(a) No attempt is made to apply 11 U. S. C. 95(f) which expressly authorizes the intervention of additional creditors to "join in the petition". Reliance is placed upon 11 U. S. C. 607 which contains no reference to intervention in support of the petition and therefore does not modify 11 U. S. C. 526 in the same manner that 11 U. S. C. 95(f) modifies 11 U. S. C. 59(b).

(b) Intervention in support of a petition in ordinary bankruptcy can obviously occur only prior to adjudication.

Under Chapter X, approval of a reorganization petition is equivalent to the adjudication in ordinary bankruptcy. The intervention which occurred in this proceeding occurred *after approval of the petition.* It was obviously not timely even though (which we deny) it would have been permissible prior to January 2, 1959. Consequently, respondents attempted distinction of *U. S. ex rel. Texas Portland Cement Company* v. *McCord* (1914), 233 U. S. 157, on the ground that in that case the intervention was not timely, does not distinguish. In this case, as in that, intervenors, who, at the time could have begun a new proceeding, attempted by intervention to give life to a proceeding which had never been lawfully begun.

(c) An intervention such as is attempted here, in support of a petition known to be defective for lack of three creditors and known to have been filed in bad faith, necessarily brands the intervening creditors with the same lack of good faith evidenced by the initial petition. The intervention in effect adopts the original petition and in addition to this it constitutes the institution of a reorganization proceeding against an alleged debtor already disabled from resistance by the wrongful approval of the original defective petition. Surely such an attempt to obtain advantage over a litigant incapable of litigating exhibits anything but good faith.

VI.

The appeals from the orders of allowance and from the injunctive order were both timely because both of these were interlocutory orders entered in the course of a proceeding in which a final order of approval was (insofar as the appellants were concerned) still *in fieri.*

Petitioners are not oblivious of the fact that had the orders of allowance been entered in the course of a reorganization proceeding in which the order of approval

had become final they would have been appealable only within the time allowed by 11 U. S. C. 650. They are also aware of the time limit of forty days specified by 11 U. S. C., Sec. 48 for appeals in bankruptcy. Respondents did take a timely appeal to the Court of Appeals from the final order which re-affirmed the initial approval of the reorganization proceeding. They submit that just as under 28 U. S. C. 1292, the permission to appeal an interlocutory order within thirty days does not foreclose review of such interlocutory order on a timely appeal from a final order taken much more than thirty days from the entry of the interlocutory order, so under the Bankruptcy Act intervening interlocutory orders are appealable with the appeal from a final order. We suggest that *Albin* v. *Cowing Pressure Relieving Joint Co., et al.* (1942), 317 U. S. 211, decides nothing to the contrary. It merely holds that an interlocutory order in bankruptcy is appealable as of right without leave. It suggests nothing as to why the same rule should not apply to interlocutory appeals in bankruptcy as applies to interlocutory orders appealable under 28 U. S. C. 1292.

Summary.

It is plain that the sole purpose of this reorganization proceeding was to obtain control of an allegedly insolvent but actually very valuable corporate property. (The price at which Traylor offered either to buy or sell and the price at which Traylor refused to sell shows clearly the sham in the claim of insolvency.) The three original petitioning creditors were in fact one, namely, Ferris Traylor. Ferris Traylor also controlled the debtor's Board of Directors who were associated with him in an attempt to oust the lawful majority control. By means of this minority control a judgment of approval was ostensibly confessed by the alleged debtor on a petition supported by affidavits knowingly